CUSTOMS BULLETIN AND DECISIONS

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U.S. Customs Service

U.S. Court of Appeals for the Federal Circuit

and

U.S. Court of International Trade

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This issue contains:

U.S. Customs Service
T.D. 02–48 and 02–49
General Notices
U.S. Court of International Trade
Slip Op. 02–85 Through 02–88

DEPARTMENT OF THE TREASURY
U.S. CUSTOMS SERVICE

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U.S. Customs Service

Treasury Decisions

19 CFR Part 4

(T.D. 02–48)

PLEASURE VESSELS OF MARSHALL ISLANDS ENTITLED TO CRUISING LICENSES

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Final rule.

SUMMARY: This document amends the Customs Regulations by adding the Marshall Islands to the list of countries whose pleasure vessels may be issued U.S. cruising licenses. Customs has been informed that yachts used and employed exclusively as pleasure vessels belonging to any resident of the U.S. are allowed to arrive at and depart from the Marshall Islands ports and cruise in the waters of the Marshall Islands without being subject to formal entry and clearance procedures. Therefore, Customs is extending reciprocal privileges to Marshall Islands-flag pleasure vessels.

EFFECTIVE DATES: These reciprocal privileges became effective for the Marshall Islands on July 9, 2002. This amendment is effective August 14, 2002.

FOR FURTHER INFORMATION CONTACT: Glen Vereb, Entry Procedures and Carriers Branch, (202) 572–8730.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Section 4.94(a), Customs Regulations (19 CFR 4.94(a)), provides that U.S. documented vessels with a recreational endorsement, used exclusively for pleasure, not engaged in any trade, and not violating the Customs or navigation laws of the U.S., may proceed from port to port in the U.S. or to foreign ports without entering or clearing, as long as they have not visited hovering vessels. When returning from a foreign port or place, such pleasure vessels are required to report their arrival pursuant to § 4.2, Customs Regulations (19 CFR 4.2).

Generally, foreign-flag yachts entering the U.S. are required to comply with the laws applicable to foreign vessels arriving at, departing from, and proceeding between ports of the U.S. However, as provided in § 4.94(b), Customs Regulations (19 CFR 4.94(b)), Customs may issue cruising licenses to pleasure vessels from certain countries if it is found that yachts of the United States are exempt from formal entry and clearance procedures (e.g., filing manifests, obtaining permits to proceed and paying entry and clearance fees) in those countries.

If a foreign-flag yacht is issued a cruising license, the yacht, for a stated period not to exceed one year, may arrive and depart from the United States and to cruise in specified waters of the United States without entering and clearing, without filing manifests and obtaining or delivering permits to proceed, and without the payment of entrance and clearance fees, or fees for receiving manifests and granting permits to proceed, duty on tonnage, tonnage tax, or light money. Upon arrival at each port in the U.S., the master of a foreign-flag yacht with a cruising license must report the fact of arrival to the appropriate Customs office. A list of countries whose yachts are eligible for cruising licenses is set forth in § 4.94(b).

By an exchange of diplomatic notes between the Government of the Marshall Islands and the United States Department of State, the Marshall Islands and the United States agree to extend to yachts of each other's country reciprocal privileges. Accordingly, U.S.-flag yachts, used exclusively as pleasure vessels and belonging to any resident of the U.S., may arrive at and depart from Marshall Islands ports and to cruise the waters of the Marshall Islands without entering and clearing the Marshall Islands Customs and without payment of any charges for entering or clearing, dues, duty per ton, tonnage taxes, or charges for cruising licenses. Marshall Islands yachts will be entitled to reciprocal privileges in the United States.

On July 22, 2002, the Department of State advised the Acting Chief, Entry Procedures and Carriers Branch, U.S. Customs Service, of the agreement between the United States and the Marshall Islands, which became effective July 9, 2002. The Acting Chief, Entry Procedures and Carriers Branch, is of the opinion that satisfactory evidence has been furnished to establish the reciprocity required in § 4.94(b), effective July 9, 2002. Accordingly, the Marshall Islands is added to the list of countries set forth in § 4.94(b). The authority to amend this section of the Customs Regulations has been delegated to the Chief, Regulations Branch.

INAPPLICABILITY OF PUBLIC NOTICE AND DELAYED EFFECTIVE DATE REQUIREMENTS, THE REGULATORY FLEXIBILITY ACT AND EXECUTIVE ORDER 12866

Because this amendment merely implements a statutory requirement and confers a benefit upon the public, pursuant to 5 U.S.C. 553(b)(B), notice and public procedure are unnecessary for this amendment. Further, for the same reasons, good cause exists for the dispens-

ing with a delayed effective date under 5 U.S.C. 553(d)(1) and (3). Since this document is not subject to notice and public procedure requirements of 5 U.S.C. 553, it is not subject to the provisions of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). This document does not meet the criteria for a "significant regulatory action" as specified in Executive Order 12866.

DRAFTING INFORMATION

The principal author of this document was Janet Johnson, Regulations Branch, U.S. Customs Service. However, personnel from other offices participated in its development.

LIST OF SUBJECTS IN 19 CFR PART 4

Customs duties and inspection, Maritime carriers, Vessels, Yachts.

AMENDMENT TO THE REGULATIONS

To reflect the reciprocal privileges granted to vessels registered in the Marshall Islands, Part 4, Customs Regulations (19 CFR 4), is amended as set forth below.

PART 4—VESSELS IN FOREIGN AND DOMESTIC TRADES

1. The general authority for Part 4 and the specific authority for § 4.94 continue to read as follows:

Authority: 5 U.S.C. 301; 19 U.S.C. 66, 1431, 1433, 1434, 1624; 46 U.S.C. App.3, 91.

* * * * * * *

Section 4.94 also issued under 19 U.S.C. 1441; 46 U.S.C. App. 104.

* * * * * * *

2. Section 4.94(b), Customs Regulations (19 CFR 4.94(b)), is amended by inserting, in appropriate alphabetical order, "Marshall Islands" in the list of countries.

Dated: August 8, 2002.

HAROLD M. SINGER,
Chief,
Regulations Branch.

[Published in the Federal Register, August 14, 2002 (67 FR 52861)]

19 CFR Part 177

(T.D. 02–49)

RIN 1515–AC56

ADMINISTRATIVE RULINGS

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Final rule.

SUMMARY: This document adopts as a final rule, with some changes, proposed amendments to those provisions of the Customs Regulations that concern the issuance of administrative rulings and related written determinations and decisions on prospective and current transactions arising under the Customs and related laws. The regulatory changes involve primarily procedures regarding the modification or revocation of rulings on prospective transactions, internal advice decisions, protest review decisions, and treatment previously accorded by Customs to substantially identical transactions. The amendments are in response to statutory changes made to the administrative ruling process by section 623 of the Customs Modernization provisions of the North American Free Trade Agreement Implementation Act.

EFFECTIVE DATE: September 16, 2002.

FOR FURTHER INFORMATION CONTACT: John Elkins, Textiles Branch, Office of Regulations and Rulings (202–572–8790).

SUPPLEMENTARY INFORMATION:

BACKGROUND

Statutory and regulatory background

This document concerns amendments to Part 177 of the Customs Regulations (19 CFR Part 177) regarding the issuance of binding administrative rulings to importers and other interested persons with regard to prospective and current transactions arising under the Customs and related laws. Rulings, determinations, or decisions under specific statutory authorities provided for in the Customs Regulations other than in Part 177 (for example, in Part 133 for enforcement actions regarding intellectual property rights, in Part 174 for protests, and in Part 181 for advance rulings under the North American Free Trade Agreement) are not affected by this document.

On December 8, 1993, the President signed into law the North American Free Trade Agreement Implementation Act (Public Law 103–182, 107 Stat. 2057). Title VI of that Act contained provisions pertaining to Customs Modernization and thus is commonly referred to as the Customs Modernization Act or "Mod Act." The Mod Act included, in section 623, an extensive amendment of section 625 of the Tariff Act of 1930 (19

U.S.C. 1625) which, prior to that amendment, simply required that the Secretary of the Treasury publish in the CUSTOMS BULLETIN, or otherwise make available to the public, any precedential decision with respect to any Customs transaction within 120 days of issuance of the decision. The regulations in Part 177 currently incorporate the terms of 19 U.S.C. 1625 as they existed prior to enactment of the Mod Act.

The Mod Act amendment of section 1625 involved the following specific changes: (1) the existing text was designated as subsection (a), and in new subsection (a) the "120 days" publication time limit was changed to "90 days" and the text was modified to refer to "any interpretive ruling (including any ruling letter, or internal advice memorandum) or protest review decision;" (2) a new subsection (b) was added to provide for administrative appeals of an adverse interpretive ruling and interpretations of regulations prescribed to implement rulings; (3) a new subsection (c) was added to set forth specific procedures for the modification or revocation of interpretive rulings or decisions or previous treatments by Customs; (4) a new subsection (d) was added to provide that a decision that proposes to limit the application of a court decision must be published in the CUSTOMS BULLETIN together with notice of opportunity for public comment prior to a final decision; and (5) a new subsection (e) was added to provide that the Secretary of the Treasury may make available in writing or through electronic media all information which contains instructions, requirements, methods or advice necessary for importers and exporters to comply with the Customs laws and regulations.

The new subsection (c) provisions require publication, in the CUSTOMS BULLETIN and with opportunity for public comment, of any proposal to modify (other than to correct a clerical error) or revoke a prior interpretive ruling or decision which has been in effect for at least 60 days or which would have the effect of modifying the treatment previously accorded by Customs to substantially identical transactions, require that interested parties be given not less than 30 days after the date of publication to submit comments on the proposed ruling or decision, and require that, after consideration of any comments received, a final ruling or decision be published in the CUSTOMS BULLETIN within 30 days after the closing of the comment period, with the final ruling or decision to become effective 60 days after the date of its publication.

Publication of proposed regulatory changes

On July 17, 2001, Customs published in the Federal Register (66 FR 37370) a notice of proposed rulemaking setting forth proposed amendments to Part 177 of the Customs Regulations which included amendments to Customs procedures in response to the changes made by section 623 of the Mod Act as well as organizational and substantive changes to clarify current administrative practice and otherwise improve the layout and readability of the present regulatory texts. The proposed changes involved principally the following areas: (1) the issuance of rulings and other written advice on prospective transactions;

(2) the appeal of such rulings after issuance; (3) the modification or revocation of rulings on prospective transactions or of protest review decisions or of treatment previously accorded by Customs to substantially identical transactions; (4) the limitation of court decisions; (5) the issuance, appeal, and modification or revocation of internal advice decisions on current transactions; and (6) the treatment of requests for confidential treatment of business information submitted to Customs in connection with a request for written advice. Included in these proposed changes was a restructuring of Part 177 under which new Subpart A would consist of an overview section and a definitions section, new Subpart B would concern prospective rulings, new Subpart C would concern the internal advice procedure, new Subpart D would deal with the disclosure of confidential business information, and present Subpart B would be redesignated as Subpart E.

The July 17, 2001 notice of proposed rulemaking prescribed a 60-day period for the submission of public comments on the proposed regulatory changes. On August 28, 2001, Customs published a notice in the Federal Register (66 FR 45235) extending the public comment period for an additional 30 days, that is, until October 17, 2001. A total of 18 commenters responded to the solicitation of comments in the notice of proposed rulemaking.

The comments received by Customs were almost uniformly opposed to the organizational and substantive changes set forth in the notice of proposed rulemaking. Based on this overwhelmingly negative response, and because most of the changes proposed by Customs were discretionary in nature, that is, they were developed by Customs to address internal administrative concerns of Customs rather than statutory mandates, Customs has decided, with one exception, to withdraw those proposed changes rather than proceed with a final rule. This means that any future action taken by Customs in regard to those withdrawn proposals will be in the form of a new notice of proposed rulemaking that will provide an opportunity for public comment before final action is taken on the proposals.

The one exception to withdrawal of the proposed changes concerns proposed § 177.21, which would implement the 19 U.S.C. 1625(c) provisions regarding the modification or revocation of prospective rulings, internal advice decisions, protest review decisions, and previous treatment of substantially identical transactions. For the reasons explained below, Customs has determined that it is essential to proceed with implementation of the terms of 19 U.S.C. 1625(c) through appropriate regulatory standards.

Under the framework set forth by the Supreme Court in *Chevron U.S.A. Inc. v. Natural Resources Defense Council Inc.*, 467 U.S. 837 (1984), which was applied by the Court to Customs Regulations in *United States v. Haggar Apparel Co.*, 526 U.S. 380 (1999), a regulation promulgated by an administrative agency, if it represents the agency's statutory interpretation that fills a gap or defines a term in a way that is

reasonable in light of the legislature's revealed design, must be given controlling weight and thus will receive judicial deference. The need for regulatory standards is particularly acute regarding the modification and revocation provisions of 19 U.S.C. 1625(c) in order to (1) provide an appropriate regulatory basis for administrative procedures that Customs applies under the statute following passage of the Mod Act provisions, (2) provide guidance regarding the meaning of the statutory terms, in particular, the meaning of the term "treatment," (3) clarify the relationship between the procedures under 19 U.S.C. 1625(c) and other legislative, judicial or administrative actions that have the same effect as a modification or revocation under that statutory provision, and (4) prescribe standards for the application of the statutory modification or revocation effective date provisions to Customs transactions.

As explained in detail in the preamble to the July 17, 2001, notice of proposed rulemaking, proposed § 177.21 was drafted in order to set forth the Customs interpretation and application of the statutory modification and revocation provisions. That proposed text engendered a significant number of comments, which are discussed below. In addition, Customs performed an internal review of the proposed text after the close of the comment period (1) to determine whether additional clarification of the Customs position regarding the modification or revocation of treatments was necessary beyond any changes suggested by the commenters and (2) as a consequence of the decision not to proceed with the proposed restructuring of Part 177, to assess the manner in which the proposed § 177.21 text could best be included within the existing Part 177 regulatory framework. The decisions taken as a result of that internal review are reflected in the discussion of the additional changes to the regulatory texts which follows the comment discussion.

Discussion of Comments

Of the 18 commenters who responded to the solicitation of comments on the proposed Part 177 changes, 14 provided one or more specific comments on the proposed § 177.21 text. The comments are discussed below.

Comment:

Five commenters took issue with the statement in the first sentence of proposed § 177.21(a) that a prospective ruling or an internal advice decision or a holding or principle covered by a protest review decision may be modified or revoked if found to be in error or not in accord with the current views of Customs. Three of these commenters argued that the regulations need more specific criteria (rather than only "if found to be in error or not in accord with the current views of Customs") in order for Customs to modify or revoke current rulings: modification or revocation should be limited to situations where there has been a change in the law, or where the previous interpretation of Customs is construed to be erroneous as a matter of law, and *not* merely because Customs changes its mind. Another commenter stated that modification or revocation of rulings or decisions found to be "not in accord with the current views of

Customs" should be limited to purely administrative positions and should not include derogation of a court ruling or other higher authority, because Customs cannot take a "current view" contrary to a higher authority, and the commenter suggested that this point should be clarified in the final regulations. One commenter stated that the words "not in accord with the current views of Customs" are too vague and should be replaced by a statement that the authority of Customs to modify or revoke is limited to situations where there are two or more inconsistent rulings, because this is how the words in question have historically been applied. Finally, one commenter pointed out that, even under the level of deference adopted in *United States v. Mead Corp.*, 121 S. Ct. 2164 (2001), Customs is entitled to deference only if it has provided a well-thought-out position, and this standard is not reflected in this proposed provision.

Customs response:

Customs first notes that the phraseology in question, that is, "in error or not in accord with the current views of Customs," does not constitute a new regulatory standard but rather merely reflects a standard that has existed in the regulations for many years under 19 CFR 177.9(d)(1). Moreover, while the proposed § 177.21 text was intended to carry out the terms of 19 U.S.C. 1625(c) as added by section 623 of the Mod Act, it is noted that the statutory amendment did not create new substantive standards that Customs must apply in deciding whether to modify or revoke a ruling, etc., but rather merely imposed certain procedural safeguards regarding modification or revocation actions. Therefore, Customs believes that the submitted comments are directed primarily to historical Customs practices rather than to new statutory standards imposed by the Mod Act changes. This being said, Customs in part agrees and in part disagrees with the points made by these commenters.

Customs agrees that, as a basic principle, a ruling, etc., should be modified or revoked if it is "erroneous as a matter of law," and, for that reason, the regulatory text in question continues to provide that, "if [a ruling is] found to be in error," modification/revocation authority will be exercised. The suggestion that Customs might modify or revoke a ruling for other than legal reasons is incorrect. All proposed modifications/revocations issued under 19 U.S.C. 1625(c) will be based upon the current views of Customs regarding the proper interpretation of the law.

The modification or revocation of a ruling or decision has always involved a purely administrative position, and nothing in the proposed regulatory texts purported to change that fact or to otherwise suggest that a modification or revocation might be in derogation of an applicable court decision or other higher authority. However, Customs believes that inclusion in the regulations of a statement on this point is unnecessary.

Customs does not agree that the words "not in accord with the current views of Customs" have historically been applied in modification or revocation cases only where there are two or more inconsistent rulings.

The phrase in question has been applied by Customs in a variety of different circumstances not involving inconsistent rulings, including circumstances in which all extant rulings on a particular issue are consistent but legally incorrect. Therefore, the statement suggested by the commenter should not be included in the regulatory text.

Finally, Customs does not believe that the issue of deference under the *Mead* case is appropriate for treatment in this regulatory context. The *Mead* case concerned the degree to which the courts may give deference to rulings issued by Customs, which is a function of the ruling itself and not the regulations under which the ruling is promulgated. The granting of deference is a matter for the courts to decide and is not a proper subject for these regulations.

Comment:

Two commenters questioned whether the intent of referring to "prospective" rulings, as opposed to "interpretive" rulings as used in the statute, is intended to give greater breadth to the notice and comment regulation. If only related to prospective rulings, these commenters questioned how it can apply to internal advice rulings, which are considered current transactions, or to protest review decisions, which involve entries already liquidated. As to the reference to coverage of the regulation to protest review decisions, these commenters expressed uncertainty regarding how Customs intends to implement 19 U.S.C. 1625(c). They stated that they suspect that the new regulation is nothing more than an embodiment of existing practice whereby Customs Headquarters issues a section 1625 notice and comment when a holding or principle reflected in a previous protest review decision is modified or revoked, either by the issuance of a prospective ruling, or internal advice or protest review decision. The commenters felt that the interaction between the administrative rulings regulations, 19 CFR Part 177, and the protest regulations, 19 CFR Part 174, is highlighted by the comments here and, because of this, they expressed the belief that it would be appropriate for Customs simultaneously to revise Part 174 as well.

Customs response:

In the preamble portion of the July 17, 2001, notice of proposed rulemaking Customs gave two reasons for referring to "prospective" rulings in the proposed § 177.21 text (see 66 FR 37374). First, the chosen terminology reflects a decision Customs has taken to use a prospective ruling as the means for carrying out a modification or revocation referred to in the statute or in the present regulatory text. Second, as regards what may be the subject of a modification or revocation, the reference to "prospective" (rather than "interpretive") rulings was intended to ensure coverage of all rulings issued under new Subpart B. Thus, under the proposed text, only a prospective ruling issued under Subpart B (and not, for example, an internal advice decision issued under proposed Subpart C) could effect a modification or revocation. In light of the decision not to proceed with the organizational changes set forth in the proposed rulemaking, Customs has reconsidered the use of the word "prospec-

tive." Accordingly, the regulatory text will follow the statutory language and refers to "interpretive" rulings, which includes internal advice decisions.

As regards the commenters' concerns regarding the relationship between Part 174 and Part 177, they are correct that the proposed regulatory text in effect embodies present administrative practice except for the fact that, as explained above, Customs uses an interpretive ruling (but not an internal advice decision and not a protest review decision) as the modifying or revoking vehicle. With regard to the suggestion that Parts 174 and 177 be revised simultaneously, Customs does not believe that this would be appropriate given the separate statutory bases for the two parts and the narrowed focus of this final rule document. However, the current administrative procedure will continue as regards the modification or revocation of a holding or principle contained in a protest review decision, and Customs at an appropriate future date will propose conforming changes to the Part 174 texts to refer to the procedures embodied in the Part 177 texts.

Comment:

Customs should not modify or revoke any ruling in a manner that is adverse to an interested party unless the original ruling is clearly wrong, such as where a new law is passed, a provision in the HTSUS has been enacted, or a new court decision has been issued.

Customs response:

Customs does not disagree with the suggestion that a ruling that is "clearly wrong" should be modified or revoked, and, for that reason, Customs retains in the regulatory text the authority to propose a modification/revocation if a ruling "is found to be in error." Moreover, the commenter appears to entirely misconstrue the scope of both the statute and the proposed regulatory text. The Mod Act changes reflected in the 19 U.S.C. 1625(c) procedures were directed to discretionary decisions taken by Customs on its own initiative under its administrative authority and were not intended to affect legislative, judicial or other actions over which Customs has no control. It was for this reason that Customs included paragraph (d) of proposed § 177.21 which lists exceptions to application of the notice requirements of paragraphs (b) and (c). The "clearly wrong" standard as suggested by the commenter would be too restrictive and contrary to the legislative intent.

Comment:

It should be more difficult for Customs to revoke an existing ruling, because importers need to be able to rely on rulings in order to plan their business. While the fact that a hardship can result from a sudden revocation of a ruling is not a new issue, it was recently raised in *Heartland By-Products, Inc. v. United States of America and United States Beet Sugar Association*, Slip Op. 99–110 (CIT 1999). Based on a ruling obtained from Customs that classified a sugar syrup in a tariff provision to which the tariff rate quota system of the U.S. sugar program did not ap-

ply, Heartland in 1997 invested $10 million in a syrup importing and refining operation. Subsequently, domestic sugar manufacturers sought a reclassification of Heartland's syrup and Customs in 1999 published a notice of its intent to revoke the Heartland ruling, the effect of which would have been to raise the tariffs Heartland would have to pay by more than 7000 percent, thereby effectively forcing Heartland to shut down its operation. The Court of International Trade in its decision determined that Customs' reclassification of the sugar syrup was arbitrary, capricious and an abuse of discretion.

Although *Heartland* is an extreme example, the sudden revocation of a ruling may raise important reliance issues. Due to the similarity between Internal Revenue Service private letter rulings and Customs rulings (in particular as regards their applicability only to the persons who requested them and as regards their validity only to the extent that the facts are correct), the sense of fair play that applies to IRS rulings (that is, that once issued, a ruling can be acted on with reliance and thus should not be disturbed) should also apply to Customs rulings. Moreover, based on a basic notion of fairness, the doctrine of equitable or regulatory estoppel should apply to, and thus should be a bar to, the revocation of rulings, particularly where a party has relied on a ruling to its detriment. Another possible solution to the detrimental reliance issue would be to adopt a binding declaratory ruling procedure similar to the declaratory judgment used by the courts, with the declaratory ruling being binding on Customs so that Customs could not change its position once the recipient has acted in reliance on the ruling. Another solution to detrimental reliance might be to apply administrative equity principles involving hardship exceptions (when a substantial hardship on the petitioner would result), fairness exceptions (when a rule is unreasonable when applied to the petitioner) and policy exceptions (when the goal or purpose of the rule can be achieved by other means).

Customs response:

Customs does not believe that the decision of the Court of International Trade in the *Heartland* case cited by this commenter serves as a proper example for the various points made by the commenter, because that decision was reversed by the United States Court of Appeals for the Federal Circuit in *Heartland By-Products, Inc. v. United States and United States Beet Sugar Association*, 264 F.3d 1126 (2001) and because that litigation remains pending as Heartland filed a petition for Supreme Court review on April 3, 2002.

While Customs would agree with the general proposition that importers need to be able to rely on rulings issued under Part 177 in order to plan their business, that reliance has never been an absolute right. Section 177.9(a) of the Customs Regulations (19 CFR 177.9(a)), which predated the statutory changes made by the Mod Act, provides, among other things, that a ruling letter issued by Customs under Part 177 is binding on all Customs personnel in accordance with the provisions of that section until modified or revoked and, in the absence of a modifica-

tion or revocation which affects the principle of the ruling, may be cited as authority in the disposition of transactions involving the same circumstances. Thus, even before the Mod Act changes to 19 U.S.C. 1625, reliance on rulings was a qualified right.

With regard to the suggestions that it should be more difficult for Customs to revoke an existing ruling, that a hardship results from a "sudden" revocation of a ruling, and that principles of detrimental reliance, fair play, equitable or regulatory estoppel, binding declaratory rulings, and administrative equity should be applied, Customs believes that the public notice and comment and delayed effective date provisions of 19 U.S.C. 1625(c) reflect the full extent to which Congress believes that these principles should apply to Customs rulings. Accordingly, it would be inappropriate for Customs to adopt additional regulatory standards that might be inconsistent with the limited procedural safeguards established by Congress in the statute.

Comment:

Three commenters argued that, as a matter of fairness and due process, Customs should publish a notice and allow public comment also in cases in which 60 days have not passed since issuance of the ruling. Another commenter, after referring to the 60-day period during which no notice or comment period is contemplated, stated that the regulations should be clarified so that "no notice or comment period" will apply only in cases involving clerical errors because a change to the substance or logic of a decision should be subject to public notice and comments.

Customs response:

The proposed regulatory text follows the statute in providing for public notice and comment procedures only in the case of a modification or revocation of a ruling that has been in effect for 60 or more days. That 60-day period was included in the Mod Act changes to section 1625 and, in Customs view, represents an implicit statement by Congress on the issue of fairness and due process when there is a change to the substance or logic of a ruling.

With regard to clerical errors, proposed § 177.21(d)(2)(i) follows the statute in providing that no publication (and thus no public notice and comment) is required if the modifying ruling corrects a clerical error.

Comment:

One commenter suggested that, although the concept of distinguishing between rulings that have been in effect for less than 60 calendar days and those in effect for 60 or more calendar days is appropriate, proposed § 177.21(e)(1), which addresses rulings or decisions in effect for less than 60 days, should be modified to address a situation in which a person obtains a prospective ruling and orders goods in reliance on it, because that person should not have the ground rules changed with respect to goods that are covered by bona fide long-term contracts or are already ordered and/or en route to the United States on the date of is-

suance of the modification or revocation but that are actually imported on or after the date of issuance of the modification or revocation. Along a similar line, another commenter stated that proposed § 177.21(e)(1) fails to take into account the situation where an importer orders goods in reliance upon a ruling or decision only to have it modified or revoked without notice and opportunity to comment: the regulations should address this type of situation because to not do so could potentially result in a great hardship to an importer who dutifully followed a reasonable course of action.

Customs response:

Customs believes that the issues of good faith reliance and potential hardship have been addressed by Congress in the changes to section 1625 made by the Mod Act. Congress expressly chose to make a distinction between rulings in effect for less than 60 days (for which public notice and comment and delayed effective date requirements do not apply in the case of a modification or revocation) and rulings in effect for 60 days or more (in which case modification or revocation is subject to public notice and comment and delayed effective date requirements). The provisions of proposed § 177.21(e)(1) merely reflect this distinction as regards the effective date for a modification or revocation of a ruling that has been in effect for less than 60 days.

In the preamble portion of the July 17, 2001, notice of proposed rulemaking Customs stated that it was proposing "to eliminate the principle of detrimental reliance (which was a purely regulatory creation) from the Part 177 texts because the Mod Act statutory amendments regarding the modification or revocation of rulings and previous treatment (including the provision for a delayed effective date) accomplish essentially the same purpose and therefore should be viewed as replacing it." In view of this stated position, Customs does not believe that it would be appropriate to reinsert the concept of detrimental reliance in response to these comments. Furthermore, introduction of a detrimental reliance standard would be contrary to the regime created by Congress in the statute.

In particular with regard to prospective rulings issued under Part 177, the terms of section 1625(c) implicitly encourage members of the trade community to exercise prudence in signing contracts before receipt of a needed ruling or during the 60-day period after issuance of the ruling, because there is always a possibility that the issued ruling will conflict with the expectations under the contract or will be modified or revoked to the recipient's detriment without advance notice during the 60-day period after issuance. The same need for prudence would apply in the case of a long-term contract signed more than 60 days after the issuance of a ruling because of the possibility that a later modification or revocation of the ruling could compromise the terms of the ongoing contract, and in this case the fact that the public notice and comment and delayed effective date provisions under section 1625(c) were followed might afford minimal benefit to the ruling recipient as regards his con-

tractual obligations. Moreover, Customs would suggest that ruling recipients could mitigate the negative effect of a modification or revocation both during and after the 60-day period by including escape clauses in their contracts which would provide a way out if Customs modified or revokes a ruling.

Finally, the commenters observations appear to be directed to situations in which a modification or revocation has a negative impact on the interests of the ruling recipient. However, there could be circumstances in which the modification or revocation militates in the favor of the ruling recipient.

Comment:

Four commenters stated that reliance on publication of a proposed modification or revocation only in the CUSTOMS BULLETIN creates a potential problem because there have been significant delays in distributing the CUSTOMS BULLETIN beyond the normal 2-week delay and thus there is not sufficient time to respond to the proposed change. Therefore, these commenters suggested that Customs should commit to posting all proposed modifications or revocations at an Internet-accessible location, and two of these commenters suggested as an alternative that Customs should allow more time to comment. Two other commenters opined that the 30-day period for commenting is too short, and one of these commenters argued that a period of at least 60 days should be allowed for submitting comments on a proposed modification or revocation.

Customs response:

Publication in the CUSTOMS BULLETIN must remain the publication standard for legal purposes, including for purposes of establishing the start of the comment period, because that is the procedure prescribed in the statute. However, in recognition of the delays associated with CUSTOMS BULLETIN publication and distribution, Customs has adopted two additional "heads up" procedures to alert interested parties to the impending modification or revocation action. One of these procedures involves posting the notice of the proposed modification or revocation on the Customs Internet web site. The other procedure involves writing to all parties identified in the notice of proposed action as recipients of the ruling or decision or treatment that is the subject of the proposed modification or revocation.

With regard to the 30-day comment period, which represents the minimum standard required by the statute, Customs did not opt for a longer period for several reasons. First, a longer comment period would only serve to delay the adoption of a final modification or revocation and thus would interfere with another important mission of Customs which is to ensure proper application of the law at the earliest practicable date. Second, the additional "heads up" procedures mentioned above typically take place several days before CUSTOMS BULLETIN publication and thus have the practical effect of extending the comment period by providing advance notice of the proposed action. Third, Customs does not

believe that a longer period is needed, particularly in view of the fact that the affected parties already are generally knowledgeable regarding the issue raised in the proposed modification or revocation and therefore should not require an extended period of time in which to prepare a response to the proposed action.

Comment:

Four commenters argued that the notice and comment provisions should not apply in the case of a ruling that is the subject of an appeal under proposed § 177.20 if transactions covered by the ruling have been held in abeyance pending a favorable decision on the appeal, because the ruling has not been applied to an actual transaction and thus should not be considered to be in effect for purposes of the 60-day period after which the notice and comment procedure is required.

Customs response:

Customs does not agree with the premise that underlies the position of these commenters, that is, that a ruling is not considered to be in effect if it has not been applied to an actual transaction. On the contrary, as stated in present § 177.9(a) and as repeated in proposed § 177.19(a), a ruling is generally effective on the date of issuance (a principal exception to this general rule would be a modifying or revoking ruling to which the statutory 60-day delayed effective date applies). Thus, the fact that an appeal of a ruling is pending does not delay the effective date of the ruling and therefore does not delay the running of the 60-day period after which a ruling may be modified or revoked only after the statutory public notice and comment procedures have been completed. Moreover, the position of Customs regarding the application to current transactions of a ruling undergoing an appeal was made clear in proposed § 177.20(e) which provided that the filing of an appeal "will not result in a suspension of liquidation in the case of current transactions" (while Customs might decide to delay liquidation pending a decision on the appeal, the decision to do so would be made based on operational considerations that are not a function of the Part 177 texts).

Comment:

Two commenters complained that Customs appears to be requiring that people come forward and advise Customs that they have a ruling when they are not specifically identified in the published notice, but the statute did not intend that such a burden be imposed on the public.

Customs response:

Customs believes that these commenters have misread the proposed regulatory text. Proposed § 177.21(b)(1), which concerns publication of the proposed action, provides in this regard that the notice will refer to all previously issued rulings that Customs has identified as being the subject of the proposed action and will "invite" any member of the public who has received another ruling involving the issue that is the subject of the proposed action to advise Customs of that fact. Nowhere does the

regulatory text require a member of the public to respond to the notice. Moreover, proposed § 177.21(b)(2), which concerns the notice of final action, specifically provides that publication of a final modifying or revoking notice will have the effect of modifying or revoking "any" ruling that involves merchandise or an issue that is substantially identical in all material respects to the merchandise or issue that is the subject of the modification or revocation, including a ruling "that is not specifically identified in the final modifying or revoking notice." Therefore, an unidentified ruling recipient does not have to respond to the notice in order for the modification or revocation to apply to his ruling.

Customs further notes that even though a response to the notice of proposed modification or revocation is not required, there may be circumstances in which an affected ruling recipient not identified in the notice would prefer to respond to the notice. A response to the notice would mean that the ruling recipient would receive a final written decision on the proposed modification or revocation directly from Customs. Moreover, this would facilitate the exercise of the ruling recipient's option under proposed § 177.21(e)(2)(ii) to have the position reflected in the modification or revocation applied to his transactions upon publication of the final notice in the CUSTOMS BULLETIN rather than 60 days thereafter.

Comment:

Three commenters noted that the statute imposes a responsibility on Customs to publish notice and allow for comment when it contemplates modification or revocation of rulings. Thus, these commenters argued that it is incumbent upon Customs to identify the relevant rulings, either those directly involved or those affecting substantially identical merchandise or issues. The commenters believe that imposition of this burden on the importing community is antithetical to the role of Customs in the partnership created by "informed compliance," and it imposes an impossible burden on the importing community which must speculate as to which rulings are covered. The commenters further complained that reference in current modification or revocation notices imposing an obligation on importers to come forward and speculate whether their rulings are "substantially similar" or risk being found not to have exercised "reasonable care" is again antithetical to the concept of "informed compliance," whereby Customs must clearly state its position so that the public knows what is expected of it.

Another commenter similarly argued that requiring the public to report to Customs rulings that are potentially affected by a proposed modification represents an onerous burden and puts importers in an impossible situation because proposed modifications do not specify the practice or position that is being altered: typically, there is a clear change in classification but there is no clear identification of the practice or policy being changed, and thus it requires gross speculation on the part of importers.

Customs response:

As pointed out in the preceding comment response, there is no requirement that a ruling recipient come forward in response to a notice of proposed modification or revocation. Therefore, Customs does not agree with the commenters that the proposed regulatory text imposes an onerous or impossible burden on the importing community. When Customs determines that a proposed modification or revocation action is appropriate, Customs first endeavors to identify all rulings that would be affected by the proposed action so that they may be identified in the notice of the proposed action. It must be recognized, however, that a review of the available records may not disclose all existing affected rulings-hence the invitation in the proposed regulatory text for other ruling recipients to come forward.

Customs also disagrees with the suggestions that the notices of proposed modification or revocation do not clearly state the position of Customs and do not clearly identify the practice or policy that is being changed. Customs believes that the published notices of proposed modification or revocation are, by-and-large, clear and complete on these points. What may not be clear is the extent to which the proposed action would affect rulings not identified in the notice that appear to be similar or related to the identified ones but that involve varying degrees of differences in the factual patterns or issues identified in the proposal. It is not possible for the notice of proposed modification or revocation to be definitive in this area because what is involved is essentially a judgment call requiring a determination on a case-by-case basis. Moreover, it should be noted that while Customs issues thousands of rulings each year, the average importer receives only a handful of rulings during a given year; therefore, the importer is in a far better position to assess the impact of a proposed modification or revocation on the handful of its rulings than is Customs which is required to employ a much wider frame of reference. The invitation to the public to participate at the proposal stage, which also includes an opportunity to comment on the proposed action, can also serve as a mechanism for obtaining clarification on this type of issue.

As concerns the comments regarding reasonable care, Customs notes that the exercise of reasonable care by importers at the time of entry is a requirement under section 484(a) of the Tariff Act of 1930, as amended (19 U.S.C. 1484(a)), and therefore is not a direct function of the ruling modification or revocation process under 19 U.S.C. 1625(c) and the proposed Part 177 regulatory texts. Nevertheless, there is a connection between the exercise of reasonable care at the time of entry and the ruling modification or revocation process in that an importer who has a ruling that has been modified or revoked could be liable for a penalty under section 592 of the Tariff Act of 1930, as amended (19 U.S.C. 1592), for failure to exercise reasonable care if he continues to enter his merchandise in accordance with the modified or revoked ruling after the modification or revocation has taken effect. This is the basic point of publishing modi-

fication or revocation proposal notices. Of course, the determination of whether an importer has failed to exercise reasonable care must be made on a case-by-case basis based on an assessment of all relevant factors, and it is for this reason that the proposed modification or revocation notice refers to "the rebuttable presumption of lack of reasonable care on the part of the importer or its agents" for failure to follow the result reflected in the notice.

Comment:

One commenter claimed that the relationship between proposed § 177.21(c) and 19 U.S.C. 1315(d) is not clear because the notice provisions of the regulation are inconsistent with those of the statute, because the statute speaks of an established and uniform practice, and because, even though proposed § 177.21(d)(1)(viii) suggests that the provisions of proposed § 177.21 are inapplicable, there is an element reminiscent of a "simultaneous equation" associated with the two provisions (the commenter asked in this regard whether, for example, Customs is attempting to state that a two-year period immediately prior to publication is insufficient to establish a uniform practice). This commenter argued that, therefore, the purpose of § 177.21(c) is unclear.

Customs response:

Customs believes that the purpose of proposed § 177.21(c) is clear: it implements the terms of 19 U.S.C. 1625(c) as regards the modification of treatment previously accorded by Customs to substantially identical transactions, which is subject to the same public notice and comment and delayed effective date requirements that apply in the case of a modification or revocation of a ruling or decision that has been in effect for 60 or more days. It does not implement or otherwise affect established and uniform practices referred to in 19 U.S.C. 1315(d) which were the subject of proposed new § 177.22.

The relationship between proposed § 177.21(c) and 19 U.S.C. 1315(d) involves separate statutory and regulatory contexts (the 19 U.S.C. 1315(d) provisions are presently dealt with in the Customs Regulations in 19 CFR 177.10(c)), and therefore they operate independently of each other. The notice and delayed effective date provisions are different in the two statutes (one provides for publication in the Federal Register and specifies a 30-day delayed effective date and the other prescribes publication in the CUSTOMS BULLETIN and a 60-day delayed effective date). Therefore, the two provisions cannot operate simultaneously, and it was for this reason (as well as for purposes of administrative efficiency) that Customs provided in proposed § 177.21(d)(1)(viii) that the publication and issuance requirements set forth in paragraphs (b) and (c) of proposed § 177.21 do not apply if a modification or revocation in effect results from publication of a final ruling regarding a change of established and uniform practice under 19 U.S.C. 1315(d). The 2-year period for a treatment prescribed in proposed § 177.21(c) has no bearing on whether an established and uniform practice exists within the meaning of 19 U.S.C. 1315(d), and, furthermore, the standards for determining

whether a treatment exists differ from those that apply in determining whether there is an established and uniform practice in that in the latter case the uniformity must be nationwide for all Customs transactions involving the issue in question. Accordingly, there is no "simultaneous equation" as regards the statutory or regulatory provisions of these two programs.

Comment:

Five commenters argued that "treatment" should not be restricted to the classification of merchandise, because other areas (for example, valuation, country of origin marking, entry, and carriers) also involve treatments. Along the same line, another commenter suggested that the definition of "treatment" as relating to the "classification of imported merchandise" should be changed to refer to "a consistent pattern involving imported merchandise" because not including other issues is unwarranted and is not a reasonable interpretation of 19 U.S.C. 1315(d).

Customs response:

For the reasons stated in the preceding comment response, Customs does not agree with the suggested connection between "treatments previously accorded" under proposed § 177.21(c) which implements 19 U.S.C. 1625(c) and "established and uniform practices" under 19 U.S.C. 1315(d). However, Customs agrees with the main point made by these commenters that "treatment" should not be limited to decisions involving the classification of imported merchandise. The regulatory text set forth in this final rule document has been modified accordingly.

Comment:

Five commenters objected to the statement in proposed § 177.21(c)(1)(ii) that a person may not claim as a treatment the treatment that Customs accorded to transactions of another person. These commenters made the following specific points in support of the proposition that a person should be able to claim as a treatment the treatment accorded to transactions of another person:

1. In light of the official doctrine of uniformity, it is unacceptable that treatment accorded to transactions of another importer should not be considered at all: so long as sufficient data of the importations of other importers is provided, those importations should be relevant in determining whether a treatment exists.

2. Customs should abandon the notion that treatment is personal and should retain the standard in the current regulation, § 177.9(e), which describes "modifying the treatment previously accorded by the Customs Service to substantially identical transactions of either the recipient of the ruling letter or other parties," because, as Customs noted in the notice of proposed rulemaking, Congress modeled section 1625(c) on that current regulation.

3. The proposed limitation of treatment to those who received the treatment will render section 1625(c)(2) virtually meaningless since

Customs has no means to identify specific parties who may have received a prior treatment and thus would not be required to publish a decision which modifies a prior treatment.

4. If this definition of treatment is retained, the effect will be negative for both Customs and the import community because it will increase the burden on both since it will serve to reinforce the requirement that importers seek their own binding rulings and not take the risk of relying on a ruling issued to another party.

Customs response:

Customs remains of the view that, for purposes of 19 U.S.C. 1625(c)(2) and the regulatory provisions thereunder, "treatment" must have reference only to the transactions of the person who is claiming the existence of the treatment and therefore cannot be claimed by a person who has had no transactions that have been the subject of the treatment under consideration.

Customs recalls that the Mod Act changes reflected in the text of 19 U.S.C. 1625(c) were included at the insistence of the trade community to ensure that there would be a statutory protection against abrupt changes made by Customs without adequate prior notice, particularly where the change is to a ruling or decision issued by Customs, or to a pattern of actions taken by Customs on import transactions, on which a party has reasonably relied in pursuing its Customs transactions. Implicit in the Mod Act statutory changes was the idea that reasonable expectations created by the actions of Customs were entitled to some protection from subsequent actions taken by Customs. Thus, 19 U.S.C. 1625(c)(1) refers to the modification or revocation of "a prior interpretive ruling or decision which has been in effect for at least 60 days" and 19 U.S.C. 1625(c)(2) refers to the modification of "the treatment previously accorded by the Customs Service to substantially identical transactions."

For reasons of practicality, Customs disagrees with the suggestion of one of the commenters that importations of other importers should be relevant in determining whether a treatment exists so long as sufficient data regarding those importations is provided. In this regard, Customs notes that the proposed regulatory text in § 177.21(c)(1)(iii) set forth detailed requirements regarding the information that must be provided to Customs in connection with a claim that a treatment exists (for example, entry numbers and quantities and values of the imported merchandise) so that Customs may make an appropriate determination on the claim. This type of entry information is treated by Customs as confidential business information that is not disclosed to the public, and therefore it would not be available to parties who are not privy to the transactions in question. Accordingly, persons attempting to rely on a treatment accorded to another person's transactions would be unable to meet the requisite burden of proof set forth in the proposed regulatory text. In fact, in many cases a person would not even know of the other person's transactions or would not be able to determine with certainty

that the other person's transactions are substantially identical to his own.

With regard to the comment that Customs should abandon the notion that treatment is personal and rather retain the standard in present § 177.9(e), Customs believes that the commenter has misread the present text. That regulatory provision, which the commenter correctly notes was in part the genesis of the statutory "treatment" provision added by the Mod Act, refers to "treatment previously accorded * * * to substantially identical transactions of * * * other parties." The words "other parties" clearly relate only to parties who had transactions that received the treatment in question and *not* to parties who did not have transactions that received the treatment. Therefore, Customs believes that the proposed text is entirely consistent with the present § 177.9(e) text in making a clear connection between the person whose transactions received the treatment and the person who is claiming the treatment. Further, to grant a ruling or treatment universal applicability, as the commenter is proposing, would elevate each ruling or treatment to the level of an established and uniform practice and thus would render the provisions of 19 U.S.C. 1315(d) redundant and a nullity.

Customs disagrees with the commenter who alleged that the limitation of treatment to those who received the treatment will render the statutory provision meaningless because Customs will not be able to identify specific parties who received a treatment and thus will not be required to publish a decision modifying the treatment. Customs did recognize that there would be instances in which Customs is not aware, prior to issuance of a contemplated prospective ruling, that the ruling would have the effect of modifying or revoking a previous treatment, and this type of scenario was directly addressed in proposed § 177.21(c)(2)(ii). Under the proposed text, an unidentified treatment recipient would have the opportunity to write to Customs after the issuance of the ruling and obtain the protections afforded by the public notice and comment and delayed effective date provisions if an adequate case regarding the existence of the treatment is made.

The argument regarding the potential increased burden on Customs and the import community is not persuasive, for two reasons. First, even if the commenter's assumption were correct, the possibility of an increased burden on the government and on the private sector is not a sufficient basis for reaching a regulatory result that is not in accord with the underlying statutory text. Second, the decision of an importer whether to seek its own binding ruling or rely on a ruling issued to another party is a private business decision that has no effect on the issue of what constitutes a treatment.

For the above reasons, Customs believes that treatments under 19 U.S.C. 1625(c)(2) must relate to expectations created on the basis of a track record involving transactions of the person claiming the existence of the treatment.

Comment:

The proposed regulatory provisions regarding the modification or revocation of previous treatments are at variance with the decision of the U.S. Court of International Trade in *Precision Specialty Metals, Inc v. United States*, 116 F.Supp. 2d 1350 (2000), in particular as regards what constitutes a "treatment." In this regard, the *Precision* case simply states that a treatment may pertain to any "decision" made by Customs and, therefore, the provisions for a 2-year treatment period and for according diminished weight in the case of merchandise of smaller quantities or value and no weight in the case of informal entries are contrary to the judicially created standard. Moreover, as regards the 2-year treatment period, this requirement is unnecessary because importers who create the 2-year schedule will simply request the information from the Office of Strategic Trade in Customs under the Freedom of Information Act and, upon receipt of the information in Microsoft Access format, the importer would simply send the information back to Customs.

Customs response:

The *Precision Specialty Metals* case involved a review of a denial by Customs of a protest against a decision of Customs to deny drawback on 38 entries of stainless steel trim and scrap. One of the issues addressed by the court was whether the payment of drawback on 69 previous entries of stainless steel scrap was a "treatment" under 19 U.S.C. 1625(c) which, if so, would mean that the decision on the protest was invalid if Customs had not first published a proposed and final modification or revocation of that treatment as required by the statute. However, Customs notes that the decision cited by the commenter (referred to in this comment discussion as *Precision I*) did not involve a substantive ruling on the treatment issue because the court concluded that the importer had not presented the court with sufficient record evidence to conclude that all required elements of section 1625(c) were satisfied: the Court of International Trade addressed the merits of the treatment issue in a subsequent decision involving the same parties and the same 38 entries, *Precision Specialty Metals, Inc v. United States*, Slip Op. 01–148, decided December 14, 2001 (referred to in this comment discussion as *Precision II*). Nevertheless, the court in *Precision I*, in reciting the criteria that the court would use in analyzing the importer's claim for relief under section 1625(c), stated that "[t]he term 'treatment' looks to the *actions* of Customs, rather than its 'position' or policy," and that the term "treatment" is "distinct from the terms 'ruling' and 'decision'" which are covered elsewhere in section 1625(c). The *Precision I* court then stated: "This construction would recognize that importers may order their actions based not only on Customs' formal policy, 'position,' 'ruling' or 'decision,' but on its prior actions. This construction furthers the stated legislative intent underlying § 1625(c)."

In *Precision II*, the court specifically found that, in connection with "pre-liquidation reviews" of three of the earlier 69 drawback entries that were eventually liquidated for the full amount of drawback

claimed, Customs had asked the importer for additional information and documentation on the exports involved. In response, the importer furnished Customs with additional information and documentation which showed that the exported material was stainless steel scrap. The court further found that the facts set forth in a stipulation of facts agreed to by the parties were sufficient to resolve the factual issues outlined in *Precision I* so that the court could resolve the "treatment" issue on a motion for summary judgment. The court, in concluding that the actions of Customs gave rise to a treatment under section 1625(c), specifically noted "the consistent trail of correspondence and submissions in which Precision and its agents describe the entries on which drawback was granted as 'scrap'" and reiterated its holding in *Precision I* that "treatment" looks to the *actions* of Customs rather than a "position" or "policy" of Customs.

Based on the facts that were under review in *Precision I* and *Precision II*, Customs does not agree with the commenter's assertion that the proposed regulatory text is contrary to the standard set forth by the court. On the contrary, it is the position of Customs that the proposed regulatory standard is consistent with the court cases because it requires an actual action on the part of Customs (as distinguished from non-action on the part of Customs, for example, when an entry is liquidated automatically without Customs review or when an entry is liquidated by operation of law under 19 U.S.C. 1504). Moreover, as in the case of the three entries for which Customs purposely requested, received, and reviewed additional information bearing on the issue at hand in *Precision II*, the proposed regulatory text requires that Customs actually do something of significance in order to create a treatment (as distinguished from cases in which Customs gives at most cursory attention, such as informal entries and entries of small value or quantity). Therefore, the proposed regulatory text stands for the proposition that, in order for a person to be eligible for the protection afforded under 19 U.S.C. 1625(c)(2), that person must be able to make a showing that Customs took a conscious, intentional and knowledgeable action that created an impression that could give rise to an expectation as regards future action by Customs. Customs believes that this is entirely consistent with the facts involved in *Precision II*.

Customs remains of the view that the principle reflected in the proposed text is necessary because it reflects the reality in which Customs operates. With over 18 million formal entries filed each year, almost all of which are filed electronically and the majority of which are not accompanied by invoices, Customs simply does not have the resources to review every transaction and at the same time facilitate the movement of goods in international trade. In the absence of a reasonable limitation on the circumstances in which a treatment may arise for section 1625(c) purposes as set forth in the proposed regulatory text, Customs believes that a number of potential negative consequences could result either separately or together: Customs would have to monitor all Customs

transactions of whatever type arising over the preceding two years before issuing a ruling or decision to determine if section 1625(c) procedures are necessary; the number of times in which Customs must initiate section 1625(c) procedures would increase drastically; the entry and liquidation process would suffer significant delays; and/or the prospective ruling and internal advice procedures would be scaled back or eliminated in their entirety. All of the foregoing results would be inconsistent with the objectives of the Mod Act and importers' responsibilities under 19 U.S.C. 1484(a).

As regards the 2-year period prescribed in the proposed regulatory text, Customs pointed out in the preamble portion of the July 17, 2001, notice of proposed rulemaking that the proposed definition of "treatment" was drawn in part from the text of present § 177.9(e) which concerns the use of delayed effective dates in the case of ruling letters covering transactions or issues not previously the subject of ruling letters and which have the effect of modifying the treatment previously accorded by Customs to substantially identical transactions. Customs expressed in this regard the belief that use of the present regulatory standards in this new regulatory text was appropriate because, given the similarity in language, it seemed clear that the present regulation served as the model for the subsequently enacted statutory text except that application of a delayed effective date was now mandated. Customs also in that preamble stated the view that all provisions regarding detrimental reliance should be removed from the Part 177 texts because they were superseded by the section 1625(c) provisions. These remain the views of Customs. Consequently, the 2-year period set forth in the proposed text, which reflects the period prescribed in the detrimental reliance provision for treatments in present § 177.9(e) is appropriate and should be retained. Finally, as regards the commenter's assertion regarding the use of the Freedom of Information Act to obtain the information to provide to Customs covering the 2-year period, Customs does not believe that importers will effectively be able to do this because Customs does not retain the necessary information in such a way that it would on its face demonstrate the existence of a treatment.

Comment:

One commenter argued that Customs should adopt a reasonable standard for determining whether a "treatment accorded substantially similar transactions" exists. Customs should not follow through with its attempt to limit the standard for determining whether there has been such treatment. This commenter also asserted that the requirement that only entries actually reviewed by Customs (as opposed to entries liquidated by operation of law, through bypass or other automatic liquidation procedure) will count is irrational. Another commenter claimed that the limitation of treatment to instances in which Customs made a deliberative decision, usually requiring a physical examination of goods, is not adequately justified by Customs and is as objectionable as the

suggestion that, where there is a no change liquidation, there is no Customs decision to protest.

Customs response:

For the reasons stated in the preceding comment response, Customs believes that the proposed text set forth a reasonable standard for determining whether a "treatment" exists, and Customs further suggests that the rationality of that approach is supported by the holding in *Precision I* that "treatment" looks to the *actions* of Customs. Similarly, Customs believes that the preceding comment response adequately justifies the deliberative decision standard reflected in the proposed text. Finally, the comment regarding no change liquidations and protest decisions involves a separate statutory and regulatory context and therefore is inapposite.

Comment:

Based on the regulations as proposed, importers and other interested parties have little or no ability to require Customs to examine specific transactions. The review of transactions is the responsibility of Customs. Accordingly, the term "treatment" should include all importations, not just those which Customs has actually examined.

Customs response:

While Customs generally agrees with the first two statements of this commenter, Customs disagrees with the commenter's conclusion. As indicated earlier in this comment discussion, Customs must deal with a very large number of import transactions each year and must at the same time facilitate international trade. It is simply impossible for Customs to facilitate trade and at the same time review all import transactions. Accordingly, Customs has adopted procedures, such as selectivity and bypass, which are intended to strike a workable balance between these two competing goals. As a result, the vast majority of import transactions do not receive Customs review. Since those unreviewed transactions receive no action on the part of Customs, they should not be considered to constitute a "treatment" within the meaning of 19 U.S.C. 1625(c).

Comment:

Three commenters complained that the burden of proof to show a treatment (a listing by entry number, quantity and value, port of entry, and date of final action by Customs) is too great. Moreover, these commenters suggested that if Customs is not totally uniform in its treatment, the proposed regulations would appear to excuse Customs from a finding that there is a treatment triggering rights to the public.

Customs response:

Customs disagrees with the comment regarding the alleged burden, for two reasons. First, the regulatory standard reflected in the proposed text follows the text of present § 177.9(e)(2) in this regard, and Customs is not aware that importers have had particular difficulty in meeting the

burden of showing reliance on previous treatment under that provision. Second, the proposed regulatory standard appears to be consistent with the evidence of treatment on substantially identical transactions that the court in *Precision I* deemed appropriate for section 1625(c) purposes. The court noted in this regard that the plaintiff did not meet the necessary burden when it failed to provide information regarding the dates, ports and nature of the earlier transactions and a clear description of the merchandise at issue.

With regard to the issue of uniformity, several points should be noted. First, reference in the regulatory text to a "consistent pattern" in the definition of "treatment" was intended to apply only to the person claiming the treatment and not to actions of Customs involving substantially identical transactions of other persons. Moreover, there is nothing in the proposed text that requires 100 percent consistency. Customs avoided imposing a strict 100 percent requirement in recognition of the fact that a finding of reliance on a previous treatment could be reasonable even if the pattern of treatment was not entirely consistent, for example, where the actions of Customs were consistent over the entire 2-year period in all ports for a significant number of entries except for a relatively small number of isolated exceptions. On the other hand, Customs does not believe that a person should be able to claim the existence of a treatment for section 1625(c) purposes when there is no consistency in the pattern of actions by Customs, that is, when the general pattern is that different results have been reached in different ports, because the different actions of Customs can give rise to no expectation on the part of the importer regarding the specific treatment that his transactions will receive from Customs. Further, it should be noted that, in actual practice, Customs has never denied a claim of treatment based solely on an importer not having had 100 percent consistent treatment: each determination has been based on consideration of all the relevant facts involved.

Comment:

Three commenters argued that, in determining whether a treatment exists, Customs should not disregard outright informal entries or other entries where there is less scrutiny. These commenters noted that informal entries are allowed for low value shipments but that there are certain informational requirements for these low value shipments which allow Customs to use selectivity criteria to review those shipments, and they therefore suggested that informal entries should not be disregarded. Similarly, these commenters asserted that just because Customs does not choose to examine certain merchandise does not mean that the action of Customs in liquidating entries is entitled to no weight. With regard to the statement that little weight will be given for treatment purposes to transactions that have small quantities or values, another commenter noted that test transactions are legitimate importations and that for some kinds of merchandise, such as machines, small quantities are the norm.

Customs response:

As already pointed out in this comment discussion, the key issue in determining whether a treatment exists is whether, and if so the manner in which, Customs has taken action on past transactions. The reference in the proposed text to informal entries was made in a context in which there is no examination or review, and therefore the regulatory text would not preclude the consideration of informal entries on which Customs took specific action such as an examination of the merchandise or a detailed review of the supporting entry documentation. Moreover, the mere fact that Customs does not examine the merchandise does not mean that an action leading to a treatment cannot occur, because other actions by Customs, such as a review of the entry documentation or a request for additional information from the importer, can constitute adequate evidence of the existence of a treatment. Similarly, there is nothing in the proposed text that would preclude the consideration of "test transactions," and Customs further notes that transactions involving low quantity merchandise such as machines may be appropriate for consideration under the proposed text because their value probably would be significant and thus might warrant the specific attention of Customs. Finally, it should be noted that Customs has cooperated with importers and their counsel on "test transactions" or "test shipments" in resolving Customs transaction issues. It would be disingenuous of importers to "blind-side" Customs by using these test shipments as a basis for claiming that a "treatment" exists rather than advising Customs that a valid Customs transaction issue exists which warrants examination.

Comment:

Customs should delete from § 177.21 paragraph (d)(1) which sets forth exceptions to the notice requirements.

Customs response:

Customs is firmly of the opinion that paragraph (d)(1) of the proposed text should be retained in its entirety for the reasons stated in the preamble portion of the July 17, 2001, notice of proposed rulemaking, and Customs notes that the commenter provided no justification for its suggested change. The paragraph (d)(1) provisions are intended to avoid redundancy and to provide exceptions in the case of changes not occasioned by actions taken by Customs. The proposed text thus implicitly recognizes the true purpose of the section 1625(c) provisions which was only to protect importers and others from sudden actions taken by Customs. This intent was recognized in *Precision II* where the court, in discussing the relevant legislative history, noted the statement in Senate Report No. 103–189 that "importers have a right * * * to expect certainty that the Customs Service will not unilaterally change the rules without providing importers proper notice and opportunity for comment." There is nothing in the statute or its legislative history that would suggest that Congress intended that the procedural safeguards set forth in section 1625(c) would apply in the case of rulings, decisions

or treatments of Customs that are affected by subsequent laws passed by Congress or by subsequent actions taken by the President or other Executive Branch agencies or by subsequent decisions by the courts or by collateral public notice and comment procedures pursued by Customs under other authority. Rather, Customs believes that the opposite conclusion must be reached, and in this regard Customs notes that in *Sea-Land Service, Inc. v. United States*, 239 F.3d 1366 (Fed.Cir. 2001), the United States Court of Appeals for the Federal Circuit upheld the conclusion of the Court of International Trade that, where Customs made decisions as a result of a court decision that established a statutory interpretation that in effect modified or revoked previous Customs decisions, the notice and comment requirements of section 1625(c) did not apply and would serve no purpose because Customs was bound by the court decision and had no discretion to modify the court decision and thus would be unable to respond to any comments it received.

Comment:

Proposed § 177.21(d) appears to be inclusive. However, proposed § 177.21(d)(1)(iv) should be amended by adding the words "overturns or" after "which."

Customs response:

Customs believes that the suggested change would result in a redundancy and therefore would not improve the text. The proposed text refers to a judicial decision "which has the effect of overturning the Customs position" in order to cover not only Customs positions that are directly affected by the judicial decision (for example, where a specific Customs ruling or decision is subjected to judicial review) but also cases in which the issue decided by the court has a substantive effect on rulings, decisions or treatments of Customs that are not directly at issue in the litigation. The suggested change in wording would appear to set forth a distinction without a difference (in other words, a judicial decision that "overturns" something equally has the "effect of overturning" that thing). Accordingly, no change should be made in this regard. This conclusion would comport with the facts and result under the *Sea-Land* case referred to in the preceding comment response.

Comment:

Customs should not adopt the position that petitions filed under 19 U.S.C. 1516 can be decided using the procedures of 19 U.S.C. 1625(c) if the petition is filed by a domestic party, Customs agrees with the position of the domestic party, and there is an outstanding ruling in conflict with this position. If a domestic party files under section 1516, Customs is obligated to decide the issue under that statute and to provide all involved parties with the procedural safeguards dictated in that statute. Customs should not subvert the provisions of section 1516 by substituting procedures established by section 1625.

Customs response:

The comment relates to paragraph (d)(1)(v) of proposed § 177.21 which provides that the publication and issuance requirements of paragraphs (b) and (c) will not apply in circumstances in which a decision is published in the Federal Register as a result of a petition by a domestic interested party pursuant to 19 U.S.C. 1516. Customs explained in the preamble to the July 17, 2001, notice of proposed rulemaking that this provision was included because Customs did not believe that sound administrative practice would be well served by repeating in a 19 U.S.C. 1625(c) procedure what was already accomplished in a 19 U.S.C. 1516 context. Since the proposed regulatory text refers to, and therefore does not preclude, use of the 19 U.S.C. 1516 procedure, the commenter's stated concern does not relate to the wording of the regulatory text.

Rather, the commenter's concern appears to be directed to the related discussion in the preamble to the July 17, 2001, notice of proposed rulemaking regarding the procedures Customs would follow in those infrequent cases that could potentially give rise to both statutory procedures. Customs stated in this regard that the following internal approach had been developed to avoid any possible conflict between the two procedures: (1) if Customs agrees with the position presented by a domestic interested party under 19 U.S.C. 1516, Customs will then attempt to determine whether there is an extant ruling, internal advice decision, protest review decision or treatment that is in conflict with that position and, if it is determined that a conflict exists, then Customs will initiate the 19 U.S.C. 1625(c) modification or revocation procedure; or (2) if the position of Customs differs from the position of the domestic interested party and that party contests the Customs position, the matter will be resolved in accordance with the 19 U.S.C. 1516 publication procedures. The commenter appears to take issue with the first alternative procedure to the extent that it indicates that Customs would pursue a modification or revocation under section 1625(c) in lieu of an action under section 1516.

Customs believes that the alternative procedures outlined in the preamble to the July 17, 2001, notice of proposed rulemaking promote needed administrative flexibility and efficiency. Accordingly, Customs believes that the procedures outlined in the preamble to the July 17, 2001, notice of proposed rulemaking are appropriate and therefore should be retained.

ADDITIONAL CHANGES TO THE REGULATORY TEXTS

A. Additional modifications to the proposed § 177.21 text

In view of the significant number of comments submitted on the issue of treatments under the proposed § 177.21(c) text, and based on further review of this issue, Customs has determined that some other changes, in addition to those mentioned in the above comment discussion, should be incorporated in the regulatory text adopted in this final rule document. These additional changes, which Customs believes are necessary

to address issues raised by the commenters or to otherwise clarify the intent behind the proposed text, involve the following:

1. The second sentence of paragraph (c)(1) has been revised to read "[t]he following rules will apply for purposes of determining under this section whether a treatment was previously accorded by Customs to substantially identical transactions of a person." This change results in the removal of the definition of "treatment" in favor of a sequence of subparagraphs ((i) through (iv)) that set forth all operative standards for determining whether paragraph (c) applies. The reference at the end to identical transactions "of a person" is intended to reflect the necessary connection between the transactions and the person claiming the treatment.

2. Subparagraph (i)(A), which has no direct counterpart in the proposed text, provides that there must be evidence to establish that there was "an actual determination by a Customs officer" regarding the facts and issues involved in the claimed treatment. This is intended to clarify the point made in the above comment discussion that, as supported by the conclusion reached by the court in *Precision II*, there must be some review or other *action* on the part of Customs. The words "actual determination" are intended to clarify that there must be a conscious, intentional, purposeful act by a Customs officer, as distinguished from a result that arises out of an involuntary event such as an automatic liquidation or a liquidation by operation of law.

3. Subparagraph (i)(B), which also has no direct counterpart in the proposed text, provides that there must be evidence to establish that the Customs officer making the actual determination "was responsible for the subject matter" on which the determination was made. This provision is a corollary to the subparagraph (i)(A) requirement and is necessary to ensure that actions taken by Customs officers that create treatments for section 1625(c) purposes involve the exercise of proper authority and supervisory control and thus accurately represent the policy of Customs. In other words, Customs believes that it would not be appropriate for a person to rely on the advice of a Customs officer for treatment purposes if that Customs officer has no official responsibility for, and therefore no particular competence in, the issue at hand (for example, a drawback liquidator should not be relied upon for advice regarding country of origin marking requirements). This position is consistent with the facts involved in *Precision I* and *Precision II* and with the result reached by the court in *Precision II* in that the action taken by Customs that resulted in the creation of the treatment was taken by Customs officers assigned to a Customs office, that is, a drawback unit/office, specifically designated for the purpose of liquidating drawback entries.

4. Subparagraph (i)(C) follows the 2-year period provision contained in the proposed text but incorporates a number of changes. The new text provides that there must be evidence to establish that over a 2-year period "preceding the claim of treatment" (rather than "prior to publication

of the notice") Customs "consistently applied that determination on a national basis" (rather than requiring "a consistent pattern of decisions") as reflected in liquidations of entries or reconciliations "or other Customs actions" with respect to "all or substantially all of that person's Customs transactions involving materially identical facts and issues." The "preceding * * *" language merely reflects that the time the claim is made (which, under paragraph (c)(2)(ii) could occur after publication of the notice of proposed modification or revocation), rather than the date of publication of the notice by Customs, is more relevant in identifying the 2-year period for purposes of protecting the treatment rights of a person. The language that replaced the reference to "a consistent pattern of decisions" is intended (1) to avoid any uncertainty as regards what a "pattern" is, (2) to reflect the principle that, as pointed out in the comment discussion above and as reflected in the action taken by Customs on the 69 entries discussed by the court in *Precision II*, more is needed than merely a determination, that is, Customs must do something beyond making the determination, such as apply the determination in the liquidation of entries, and (3) to ensure that a treatment does not result from a geographically narrow application of a determination that is different from the action taken by Customs on that person's substantially identical transactions at other locations. The addition of the reference to "other Customs actions" is intended to clarify that Customs actions that can give rise to a treatment are not limited to liquidations. The words "all or substantially all" are intended to reflect the point made in connection with the above comment discussion that 100 percent consistency is not required for purposes of finding that a treatment exists with regard to a person's Customs transactions. Finally, the words "materially identical facts and issues" were included to clarify what is meant by the words "substantially identical" when used with reference to transactions in the introductory text of paragraph (c)(1).

5. At the end of subparagraph (ii), which repeats much of proposed paragraph (c)(1)(i), the words "import specialist review" have been replaced by "Customs officer review" to reflect the fact that review actions that can create treatments are not limited to actions of Customs import specialists.

6. Subparagraph (iii)(A) provides that Customs will not find that a treatment was accorded to a person's transactions if the person's own transactions were not accorded the treatment in question over the prescribed 2-year period. This provision represents a restatement, without substantive change, of the principle reflected in proposed paragraph (c)(1)(ii) that treatment is personal.

7. Subparagraph (iii)(B) provides that Customs will not find that a treatment was accorded to a person's transactions if the issue in question involves the admissibility of merchandise. This provision has no direct counterpart in the proposed text and has been added to clarify the existence of the essential rule that the admissibility of merchandise is always determined at the time of importation and therefore cannot be

the subject of a treatment for purposes of section 1625(c). The reason for this should be clear: in the case of merchandise that is not admissible (for example, because the merchandise has been found to exceed an applicable quantitative limit or has been found to constitute prohibited merchandise), an importer should not be allowed to continue to enter the merchandise in the United States in contravention of the applicable law regarding its non-admissibility merely because Customs has failed to follow the publication procedures under section 1625(c).

8. Subparagraph (iii)(C) provides that Customs will not find that a treatment was accorded to a person's transactions if the person made a material false statement or material omission in connection with a Customs transaction or in connection with the review of a Customs transaction and that statement or omission affected the determination on which the treatment claim is based. This provision has no direct counterpart in the proposed text and has been added to ensure that a person cannot profit from the section 1625(c) treatment provisions in circumstances in which the claimed treatment rests on a false premise resulting from an act or omission on the part of the person claiming the treatment. Customs believes that this rule is an appropriate expression of principles of equity and fair play.

9. Subparagraph (iii)(D) provides that Customs will not find that a treatment was accorded to a person's transactions if Customs advised the person regarding the manner in which the transactions should be presented to Customs and the person failed to follow that advice. This provision has no direct counterpart in the proposed text. It has been added because Customs believes that it would be inconsistent with the reliance and consistency principles that underlie the treatment provisions for a person to claim a treatment that is inconsistent with specific advice provided by Customs. Moreover, even if Customs officers have taken determinative action on the person's individual transactions that is inconsistent with the advice provided elsewhere by Customs, the person should have no expectation that Customs will continue to take those inconsistent actions in the future.

10. Subparagraph (iv) repeats the text of proposed paragraph (c)(1)(iii) regarding the burden of proof as regards the existence of the previous treatment but with the following changes: (1) in the first sentence, the words "burden of proof" have been replaced by "evidentiary burden" to avoid an overly strict standard; (2) in the second sentence, reference is made to "materially" (rather than "substantially") identical transactions to align on the language used in subparagraph (i)(C) as discussed above; and (3) at the end of the second sentence, the words "and, if known, the name and location of the Customs officer who made the determination on which the claimed treatment is based" have been added to specify other information, if available, that a person may use to convince Customs that the claimed treatment exists. In addition a third sentence has been added to the proposed text to provide that, in cases in which an entry is liquidated without any Customs review, the person

claiming a previous treatment must be prepared to submit to Customs written or other appropriate evidence of the earlier actual determination of a Customs officer that the person relied on in preparing the entry and that is consistent with the liquidation of the entry. Customs believes that this provision, which is related to the standard under subparagraph (i) that there must be a determination of Customs that has been applied to transactions, is necessary in order to enable persons to demonstrate the existence of a treatment when no specific determination was made on the person's individual transactions (an example would be where Customs issued a prospective ruling to another person and the person claiming the treatment followed that ruling in entering his identical merchandise and Customs liquidated those entries as entered and without review—presentation of the ruling to Customs would satisfy the regulatory standard).

11. Finally, at the end of the notice procedures in paragraph (c)(2)(i), the text regarding written confirmation has been simplified by referring to confirmation "sent to each person identified as having had substantially identical transactions * * *." This change conforms the text to current administrative practice.

B. Modification of present Part 177 to accommodate the final modification/revocation text

In light of the decision discussed earlier in this document to proceed with a final rule only as regards those proposed Part 177 regulatory changes that relate to the modification/revocation provisions of 19 U.S.C. 1625(c), the proposed § 177.21 text must have a new section designation in order to appear properly within the existing Part 177 structure. Accordingly, Customs in this final rule document has designated the new modification/revocation section as § 177.12 (with a consequential redesignation of present § 177.12 as § 177.13) so that it will appear after both the provision that deals with the issuance of prospective rulings (§ 177.8) and the provision that concerns the issuance of internal advice decisions (§ 177.11), because issued prospective rulings and internal advice decisions may be the subject of a modification or revocation under the new section. In addition, some minor conforming changes have been made to the wording of paragraph (a) of new § 177.12 to reflect the fact that the other structural changes to Part 177 contained in the July 17, 2001, notice of proposed rulemaking are not being adopted in this final rule document.

In addition, this final rule document makes a number of conforming changes to other existing sections within Part 177 as a consequence of the addition of new § 177.12. These changes are as follows:

1. In the second sentence of paragraph (b)(2)(ii)(B) of § 177.2, the reference to "§ 177.12" has been changed to read "§ 177.13."

2. The heading of § 177.9 has been revised to remove the reference to modification or revocation which will no longer be treated in that section.

3. The last sentence of paragraph (a) of § 177.9 has been revised to reflect the proper reference to the new modification and revocation provisions and to refer to the Federal Register (rather than the CUSTOMS BULLETIN) which is the publication medium mentioned in the referenced § 177.10(e).

4. The first sentence of paragraph (c) of § 177.9 has been revised to include exception language when the public notice and comment provisions of new § 177.12 apply.

5. Paragraph (d) of § 177.9 has been removed because it concerns the modification or revocation of ruling letters and therefore is entirely superseded by the provisions of 19 U.S.C. 1625(c) and new § 177.12.

6. Paragraph (e) of § 177.9, which concerns ruling letters modifying past Customs treatment of transactions not covered by ruling letters, has been removed because it also is entirely superseded by the provisions of 19 U.S.C. 1625(c) and new § 177.12. It remains the position of Customs that these paragraph (e) provisions formed the basis for the statutory treatment provision, and in this regard the following was stated in the July 17, 2001, notice of proposed rulemaking (at 66 FR 37375) in discussing the definition of "treatment" in proposed § 177.21(c)(1):

> In setting forth these regulatory standards, Customs has relied in part on the text of present § 177.9(e) which concerns the use of delayed effective dates in the case of ruling letters covering transactions or issues not previously the subject of ruling letters and which have the effect of modifying the treatment previously accorded by Customs to substantially identical transactions. Customs believes that use of the present regulatory standards in this new regulatory text is appropriate because, given the similarity in language, it seems clear that the present regulation served as the model for the subsequently enacted statutory text except that application of a delayed effective date is now mandated.

7. Within § 177.10, which concerns the publication of decisions, the following changes have been made: (1) paragraph (b), which concerns the establishment of a uniform practice by publication of a ruling in the CUSTOMS BULLETIN, has been removed; (2) paragraph (c) has been revised: in order to remove the reference to a change of "position" in the paragraph heading; in order to remove the second sentence of paragraph (c)(1) which concerns Federal Register publication and public comment regarding a ruling that contemplates a change of practice resulting in the assessment of a lower rate of duty; in order to remove the third sentence of paragraph (c)(1) which concerns rulings resulting in a change of practice but no change in the rate of duty; and in order to remove paragraph (c)(2) which concerns Federal Register publication and public comment regarding a contemplated ruling that has the effect of changing a position of Customs; and (3) the first sentence of paragraph (e), which concerns effective dates, has been revised to include exception language regarding modifications and revocations under new § 177.12. The changes to paragraphs (b) and (c) are substantively similar to

changes reflected in the proposed revised Part 177 texts contained in the July 17, 2001, notice of proposed rulemaking. Customs explained in the preamble to that document in regard to those changes that, except in the case of an established and uniform practice where the proposed regulatory text was directly based on 19 U.S.C. 1315(d), it was proposed to remove all references to "uniform practice" or "practice" from the Part 177 texts. The principal reason for this was that the statutory and regulatory modification/revocation standards of 19 U.S.C. 1625(c) and proposed § 177.21 had rendered these provisions redundant or otherwise unnecessary. Customs would further add that a failure to make these changes in § 177.10(b) and (c) in this final rule document will give rise to conflicts with the new § 177.12 procedures, not only in regard to the vehicle for publication (Federal Register versus CUSTOMS BULLETIN) but also with regard to the circumstances in which publication of the contemplated ruling is required and when it would take effect. Since the new § 177.12 provisions devolve from a direct statutory mandate, Customs believes that they must take precedence.

Finally, although not directly related to 19 U.S.C. 1625(c) and new § 177.12, Customs notes that paragraph (a) of present § 177.10 and paragraph (b)(7) of present § 177.11 refer to publication or other availability within "120" days, whereas 19 U.S.C. 1625(a), which applies equally to prospective rulings and to internal advice decisions, requires publication or other availability within "90" days. In addition, paragraph (a) of present § 177.10 in two places refers to a "precedential" decision whereas 19 U.S.C. 1625(a) and new § 177.12 use the word "interpretive." The regulatory texts in question have been amended in this final rule document to align on the statute and new regulatory text.

CONCLUSION

Accordingly, based on the comments received and the analysis of those comments as set forth above, and after further review of this matter, Customs believes that the proposed regulatory amendments regarding the modification and revocation of rulings, decisions, and treatments and regarding the publication of decisions should be adopted as a final rule with certain changes as discussed above and as set forth below. This document also includes an appropriate update of the list of information collection approvals (see the Paperwork Reduction Act portion of this document below) contained in § 178.2 of the Customs Regulations (19 CFR 178.2).

EXECUTIVE ORDER 12866

This document does not meet the criteria for a "significant regulatory action" as specified in E.O. 12866.

REGULATORY FLEXIBILITY ACT

Pursuant to the provisions of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), it is certified that these amendments will not have a significant economic impact on a substantial number of small entities. The regulatory amendments primarily represent a clarification of existing

statutory and regulatory requirements. Accordingly, the amendments are not subject to the regulatory analysis or other requirements of 5 U.S.C. 603 and 604.

PAPERWORK REDUCTION ACT

The collection of information contained in this final rule has been reviewed and approved by the Office of Management and Budget (OMB) in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)) under control number 1515–0228. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a valid control number assigned by OMB.

The collection of information in Part 177 of the Customs Regulations is required in connection with the consideration of requests for, and issuance of, rulings or other written advice from Customs regarding the application of the Customs and related laws to current or future transactions, in connection with modifications or revocations of prior Customs rulings or treatments, or in connection with the issuance of country-of-origin advisory rulings and final determinations relating to Government procurement. Failure to provide the required information may preclude issuance of the requested advice by Customs or may preclude the application of the requested relief or other action by Customs. The likely respondents are individuals and business or other for-profit institutions, including partnerships, associations, and corporations, and their authorized agents.

The estimated average annual burden associated with the collection of information under Part 177 is 10 hours per respondent or recordkeeper. Comments concerning the accuracy of this burden estimate and suggestions for reducing this burden should be directed to the U.S. Customs Service, Information Services Group, Office of Finance, 1300 Pennsylvania Avenue, N.W., Washington, D.C. 20229, and to OMB, Attention: Desk Officer for the Department of the Treasury, Office of Information and Regulatory Affairs, Washington, D.C. 20503.

DRAFTING INFORMATION

The principal author of this document was Francis W. Foote, Office of Regulations and Rulings, U.S. Customs Service. However, personnel from other offices participated in its development.

LIST OF SUBJECTS

19 CFR Part 177

Administrative practice and procedure, Customs duties and inspection, Government procurement, Reporting and recordkeeping requirements, Rulings.

19 CFR Part 178

Administrative practice and procedure, Reporting and recordkeeping requirements.

AMENDMENTS TO THE REGULATIONS

Accordingly, for the reasons stated in the preamble, Parts 177 and 178 of the Customs Regulations (19 CFR Parts 177 and 178) are amended as set forth below.

PART 177—ADMINISTRATIVE RULINGS

1. The authority citation for Part 177 is revised to read as follows:

Authority: 5 U.S.C. 301; 19 U.S.C. 66, 1202 (General Note 23, Harmonized Tariff Schedule of the United States), 1502, 1624, 1625.

2. In § 177.2, the second sentence of paragraph (b)(2)(ii)(B) is amended by removing the reference "§ 177.12" and adding, in its place, the reference "§ 177.13".

3. In § 177.9:

a. The section heading is revised;

b. The last sentence of paragraph (a) is revised;

c. The first sentence of paragraph (c) is revised; and

d. Paragraphs (d) and (e) are removed and reserved.

The revisions read as follows:

§ 177.9 Effect of ruling letters.

(a) * * * See, however, § 177.10(e) (changes of practice published in the Federal Register) and § 177.12 (rulings which modify or revoke previous rulings, decisions, or treatments).

* * * * * * *

(c) *Reliance on ruling letters by others.* Except when public notice and comment procedures apply under § 177.12, a ruling letter is subject to modification or revocation by Customs without notice to any person other than the person to whom the ruling letter was addressed. * * *

* * * * * * *

4. In § 177.10:

a. In paragraph (a), the first sentence is amended by removing the number "120" and adding, in its place, the number "90" and removing the word "precedential" and adding, in its place, the word "interpretive", and the second sentence is amended by removing the words "a precedential" and adding, in their place, the words "an interpretive";

b. Paragraph (b) is removed and reserved; and

c. Paragraph (c) and the first sentence of paragraph (e) are revised to read as follows:

§ 177.10 Publication of decisions.

* * * * * * *

(c) *Changes of practice.* Before the publication of a ruling which has the effect of changing an established and uniform practice and which results in the assessment of a higher rate of duty within the meaning of 19 U.S.C. 1315(d), notice that the practice (or prior ruling on which that practice was based) is under review will be published in the Federal Register and interested parties will be given an opportunity to make written submissions with respect to the correctness of the contemplated change.

* * * * * * *

(e) *Effective dates.* Except as otherwise provided in § 177.12(e) or in the ruling itself, all rulings published under the provisions of this part will be applied immediately.

* * * * * * *

5. In § 177.11, the first sentence of paragraph (b)(7) is amended by removing the number "120" and adding, in its place, the number "90".

6. Section 177.12 is redesignated as § 177.13 and a new § 177.12 is added to read as follows:

§ 177.12 Modification or revocation of interpretive rulings, protest review decisions, and previous treatment of substantially identical transactions.

(a) *General.* An interpretive ruling, which includes an internal advice decision, issued under this part, or a holding or principle covered by a protest review decision issued under part 174 of this chapter, if found to be in error or not in accord with the current views of Customs, may be modified or revoked by an interpretive ruling issued under this section. In addition, an interpretive ruling issued under this section may have the effect of modifying or revoking the treatment previously accorded by Customs to substantially identical transactions. A modification or revocation under this section must be carried out in accordance with the notice procedures set forth in paragraph (b) or paragraph (c) of this section except as otherwise provided in paragraph (d) of this section, and the modification or revocation will take effect as provided in paragraph (e) of this section.

(b) *Interpretive rulings or protest review decisions.* Customs may modify or revoke an interpretive ruling or holding or principle covered by a protest review decision that has been in effect for less than 60 calendar days by simply giving written notice of the modification or revocation to the person to whom the original ruling was issued or whose current transaction was the subject of the internal advice decision or, in the case of a protest review decision, to the person identified on the Customs Form 19 as the protestant or to any other person designated to receive notice of denial of a protest under § 174.30(b) of this chapter. However, when Customs contemplates the issuance of an interpretive ruling that would modify or revoke an interpretive ruling or holding or principle covered by a protest review decision which has been in effect for 60 or more calendar days, the following procedures will apply:

(1) *Publication of proposed action.* A notice proposing the modification or revocation and inviting public comment on the proposal will be published in the CUSTOMS BULLETIN. The notice will refer to all previously issued interpretive rulings or protest review decisions that Customs has identified as being the subject of the proposed action and will invite any member of the public who has received another interpretive ruling or protest review decision involving the issue that is the subject of the proposed action to advise Customs of that fact. Interested parties will have 30 calendar days from the date of publication of the notice to sub-

mit written comments on the proposed modification or revocation and to advise Customs in writing that they are recipients of an affected interpretive ruling or protest review decision that was not identified in the notice.

(2) *Notice of final action.* In the absence of extraordinary circumstances, within 30 calendar days after the close of the public comment period, any submitted comments will be considered and a final modifying or revoking notice or notice of other appropriate final action on the proposed modification or revocation will be published in the CUSTOMS BULLETIN. In addition, a written decision will be issued to the person to whom, or on whose transaction, the original interpretive ruling was issued or, in the case of a protest review decision, to the person identified on the Customs Form 19 as the protestant or to any other person designated to receive notice of denial of a protest under § 174.30(b) of this chapter. Publication of a final modifying or revoking notice in the CUSTOMS BULLETIN will have the effect of modifying or revoking any interpretive ruling or holding or principle covered by a protest review decision that involves merchandise or an issue that is substantially identical in all material respects to the merchandise or issue that is the subject of the modification or revocation, including an interpretive ruling or holding or principle covered by a protest review decision that is not specifically identified in the final modifying or revoking notice.

(c) *Treatment previously accorded to substantially identical transactions*—(1) *General.* The issuance of an interpretive ruling that has the effect of modifying or revoking the treatment previously accorded by Customs to substantially identical transactions must be in accordance with the procedures set forth in paragraph (c)(2) of this section. The following rules will apply for purposes of determining under this section whether a treatment was previously accorded by Customs to substantially identical transactions of a person:

(i) There must be evidence to establish that:

(A) There was an actual determination by a Customs officer regarding the facts and issues involved in the claimed treatment;

(B) The Customs officer making the actual determination was responsible for the subject matter on which the determination was made; and

(C) Over a 2-year period immediately preceding the claim of treatment, Customs consistently applied that determination on a national basis as reflected in liquidations of entries or reconciliations or other Customs actions with respect to all or substantially all of that person's Customs transactions involving materially identical facts and issues;

(ii) The determination of whether the requisite treatment occurred will be made by Customs on a case-by-case basis and will involve an assessment of all relevant factors. In particular, Customs will focus on the past transactions to determine whether there was an examination of the merchandise (where applicable) by Customs or the extent to which those transactions were otherwise reviewed by Customs to determine the proper application of the Customs laws and regulations. For pur-

poses of establishing whether the requisite treatment occurred, Customs will give diminished weight to transactions involving small quantities or values, and Customs will give no weight whatsoever to informal entries and to other entries or transactions which Customs, in the interest of commercial facilitation and accommodation, processes expeditiously and without examination or Customs officer review;

(iii) Customs will not find that a treatment was accorded to a person's transactions if:

(A) The person's own transactions were not accorded the treatment in question over the 2-year period immediately preceding the claim of treatment;

(B) The issue in question involves the admissibility of merchandise;

(C) The person made a material false statement or material omission in connection with a Customs transaction or in connection with the review of a Customs transaction and that statement or omission affected the determination on which the treatment claim is based; or

(D) Customs advised the person regarding the manner in which the transactions should be presented to Customs and the person failed to follow that advice; and

(iv) The evidentiary burden as regards the existence of the previous treatment is on the person claiming that treatment. The evidence of previous treatment by Customs must include a list of all materially identical transactions by entry number (or other Customs assigned number), the quantity and value of merchandise covered by each transaction (where applicable), the ports of entry, the dates of final action by Customs, and, if known, the name and location of the Customs officer who made the determination on which the claimed treatment is based. In addition, in cases in which an entry is liquidated without any Customs review (for example, the entry is liquidated automatically as entered), the person claiming a previous treatment must be prepared to submit to Customs written or other appropriate evidence of the earlier actual determination of a Customs officer that the person relied on in preparing the entry and that is consistent with the liquidation of the entry.

(2) *Notice procedures*—(i) When Customs has reason to believe that a contemplated interpretive ruling would have the effect of modifying or revoking the treatment previously accorded by Customs to substantially identical transactions, notice of the intent to modify or revoke that treatment will be published in the CUSTOMS BULLETIN either as a separate action or in connection with a proposed modification or revocation of an interpretive ruling or holding or principle covered by a protest review decision under paragraph (b)(1) of this section. The notice will give interested parties 30 calendar days from the date of publication of the notice to submit written comments on the proposed modification or revocation and will invite any member of the public whose substantially identical transactions have been accorded the same treatment to advise Customs in writing of that fact, supported by appropriate details regarding those transactions, within that 30-day period. Within 30 calendar

days after the close of the public comment period, any submitted comments will be considered, notice of the final interpretive ruling or other final action on the proposed modification or revocation will be published in the CUSTOMS BULLETIN. Written confirmation of the applicability of a final modification or revocation will be sent to each person identified as having had substantially identical transactions that were accorded the same treatment.

(ii) If Customs is not aware prior to issuance that a contemplated interpretive ruling would have the effect of modifying or revoking the treatment previously accorded by Customs to substantially identical transactions, the interpretive ruling will be issued and generally will be effective as provided in § 177.19. However, Customs will, upon written application by a person claiming that the interpretive ruling has the effect of modifying or revoking the treatment previously accorded by Customs to his substantially identical transactions, consider delaying the effective date of the interpretive ruling with respect to that person, and continue the treatment previously accorded the substantially identical transactions, pending completion of the procedures set forth in paragraph (c)(2)(i) of this section.

(d) *Exceptions to notice requirements*—(1) *Publication and issuance not required.* The publication and issuance requirements set forth in paragraphs (b) and (c) of this section are inapplicable in circumstances in which a Customs position is modified, revoked or otherwise materially affected by operation of law or by publication pursuant to other legal authority or by other appropriate action taken by Customs in furtherance of an order, instruction or other policy decision of another governmental agency or entity pursuant to statutory or delegated authority. Such circumstances include, but are not limited to, the following:

(i) Adoption or amendment of a statutory provision, including any change to the Harmonized Tariff Schedule of the United States;

(ii) Promulgation of a treaty or other international agreement under the foreign affairs function of the United States;

(iii) Issuance of a Presidential Proclamation or Executive Order, or issuance of a decision or policy determination pursuant to authority delegated by the President;

(iv) Subject to the provisions of § 152.16 of this chapter, the rendering of a judicial decision which has the effect of overturning the Customs position;

(v) Publication of a decision in the Federal Register as a result of a petition by a domestic interested party pursuant to 19 U.S.C. 1516 (see part 175 of this chapter);

(vi) Publication of an interim or final rule in the Federal Register in accordance with 5 U.S.C. 553;

(vii) Publication of a final interpretative rule in the Federal Register in accordance with 5 U.S.C. 553 following public notice and comment procedures; and

(viii) Publication of a final ruling in the Federal Register in accordance with 19 U.S.C. 1315(d) and § 177.22 of this part relating to change of established and uniform practice.

(2) *Publication not required.* In the following circumstances a final modifying or revoking ruling will be issued to the person entitled to it under paragraph (b) or (c) of this section but CUSTOMS BULLETIN publication under paragraph (b) or (c) of this section is not required:

(i) The modifying ruling corrects a clerical error; or

(ii) The modifying or revoking ruling is directed to a ruling issued under subpart I of part 181 of this chapter relating to advance rulings under the North American Free Trade Agreement.

(e) *Effective date and application to transactions*—(1) *Rulings or decisions in effect for less than 60 days.* If an interpretive ruling or holding or principle covered by a protest review decision that is modified or revoked under this section had been in effect for less than 60 calendar days, the modifying or revoking interpretive ruling:

(i) Will be effective on its date of issuance with respect to the specific transaction covered by the modifying or revoking interpretive ruling: and

(ii) Will be applicable to merchandise entered, or withdrawn from warehouse for consumption, on and after its date of issuance.

(2) *Rulings or decisions in effect for 60 or more days.* If an interpretive ruling or holding or principle covered by a protest review decision that is modified or revoked under this section had been in effect for 60 or more calendar days, the modifying or revoking notice will, provided that liquidation of the entry in question has not become final, apply to merchandise entered, or withdrawn from warehouse for consumption:

(i) Sixty calendar days after the date of publication of the final modifying or revoking notice in the CUSTOMS BULLETIN under paragraph (b)(2) of this section; or

(ii) At the option of any person with regard to that person's transaction, on and after the date of publication of the final modifying or revoking notice in the CUSTOMS BULLETIN under paragraph (b)(2) of this section.

(3) *Previous treatment accorded to substantially identical transactions.* A final notice that modifies or revokes the treatment previously accorded by Customs to substantially identical transactions:

(i) Will be effective with respect to transactions that are substantially identical to the transaction described in the modifying or revoking notice 60 calendar days after the date of publication of the final modifying or revoking notice in the CUSTOMS BULLETIN under paragraph (b)(2) or paragraph (c)(2)(i) of this section; and

(ii) Provided that liquidation of the entry in question has not become final, will apply to merchandise entered, or withdrawn from warehouse for consumption:

(A) Sixty calendar days after the date of publication of the final modifying or revoking notice in the CUSTOMS BULLETIN under paragraph (b)(2) or paragraph (c)(2)(i) of this section; or

(B) At the option of a person who makes a valid claim regarding previous treatment, on and after the date of publication of the final modifying or revoking notice in the CUSTOMS BULLETIN under paragraph (b)(2) or paragraph (c)(2)(i) of this section.

PART 178—APPROVAL OF INFORMATION COLLECTION REQUIREMENTS

1. The authority citation for Part 178 continues to read as follows:

Authority: 5 U.S.C. 301; 19 U.S.C. 1624; 44 U.S.C. 3501 *et seq.*

2. In § 178.2, the table is amended by removing the listings for §§ 177.2, 177.5, 177.11, and 177.12 and adding, in their place, a listing for Part 177 to read as follows:

§ 178.2 Listing of OMB control numbers.

19 CFR Section	*Description*	*OMB Control No.*
* * * * * * *		
Part 177	Issuance of administrative rulings on prospective and current customs transactions	1515–0228
* * * * * * *		

ROBERT C. BONNER,
Commissioner of Customs.

Approved: August 12, 2002.
TIMOTHY E. SKUD,
Deputy Assistant Secretary of the Treasury.

[Published in the Federal Register, August 16, 2002 (67 FR 53483)]

U.S. Customs Service

General Notices

WOOL MANUFACTURER PAYMENT CLARIFICATION AND TECHNICAL CORRECTIONS ACT

AGENCY: Customs Service, Treasury.

ACTION: General notice.

SUMMARY: On August 6, 2002, President Bush signed into law the Trade Act of 2002. Section 5101 of the Trade Act of 2002 amends section 505 of the Trade and Development Act of 2000, which entitled U.S. manufacturers of certain wool articles to a limited refund of duties paid on imports of select wool products. The amendments concern the maximum amount manufacturers are eligible to receive and include a definition of the term "manufacturer" for purposes of determining eligibility. The amendments also authorize a new class of claimants as being eligible to receive a payment, establish new deadlines for the submission and payment of claims for all claimants, and generally simplify the claims process. Section 5102 of the Trade Act of 2002 authorizes Customs to make two additional payments to eligible manufacturers. As sections 5101 and 5102 are self-effectuating, Customs will not be issuing regulations to implement the program as amended. Manufacturers are directed to follow the statutory procedures to claim a payment. For ease of reference, this document describes the changes to the wool duty payment program as set forth in section 505 of the Trade Act of 2002, as amended. The document also sets forth the address to which all wool duty payment documentation should be sent.

DATES: Claims by eligible U.S. manufacturers of men's or boys' suits, suit-type jackets and trousers, and by eligible U.S. importing-manufacturers of wool fabric and wool yarn, must be submitted to Customs postmarked no later than August 21, 2002. Claims by eligible U.S. non-importing manufacturers of wool fabric and wool yarn must be received by Customs no later than September 20, 2002.

ADDRESS: Claims for payments pursuant to section 505 of the Trade and Development Act, as amended, should be sent to the U.S. Customs Service, Office of Field Operations, Wool Duty Payment Unit, 5th Floor, Attention: Debbie Scott, 1300 Pennsylvania Avenue, N.W., 5th Floor, Washington, D.C. 20229.

FOR FURTHER INFORMATION CONTACT: Debbie Scott (202) 927–1962 or Sherri Lee Hoffman (202) 927–0542.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On May 18, 2000, President Clinton signed into law the Trade and Development Act of 2000 ("the Act"), Public Law 106–200, 114 Stat. 251. Title V of the Act concerns imports of certain wool articles and sets forth provisions intended to provide tariff relief to U.S. manufacturers of specific wool products. Within Title V, section 505 permits eligible U.S. manufacturers to claim a limited refund of duties paid on imports of select wool articles.

Section 505 was implemented in the Customs Regulations at § 10.184 (19 CFR 10.184).

On August 6, 2002, President Bush signed into law the Trade Act of 2002, H.R. 3009 (the Public Law citation is unavailable at the time of this document's filing for public inspection at the Office of the Federal Register). Division E of the Trade Act of 2002 contains miscellaneous provisions. Within Division E, Title L sets forth miscellaneous trade benefits with Subtitle A pertaining specifically to wool provisions. Within Subtitle A, section 5101, entitled the "Wool Manufacturer Payment Clarification and Technical Corrections Act," amends section 505. Specifically, section 5101 amends section 505 regarding the maximum payment amount manufacturers are eligible to receive, defines the term "manufacturer" for purposes of section 505, authorizes a new class of claimants as eligible to receive a payment, establishes new deadlines for the submission and payment of claims, and simplifies the claims process. Section 5102(c) is a related statutory provision that authorizes Customs to make two additional payments to eligible manufacturers in years 2004 and 2005.

EXPLANATION OF AMENDMENTS TO SECTION 505 EFFECTED BY SECTION 5101

Section 5101 amends 505 in several key aspects, as discussed below.

I. Payment amounts and simplified claim procedures

The original terms of section 505 authorized certain manufacturers to claim a limited refund of duties paid in each of calendar years 2000, 2001 and 2002 on imports of select wool products. The maximum amount eligible to be refunded in each claim year was limited to an amount not to exceed one-third of the amount of duties actually paid on such wool products imported in calendar year 1999. In order to receive a refund, manufacturers had to substantiate their claim to Customs by submitting relevant entry summary documentation.

Section 5101 amends section 505 regarding the amount of payment an eligible manufacturer may receive. Specifically, section 5101 authorizes eligible manufacturers to receive a *pro rata* share of a statutorily designated amount. Section 5101(2) appropriates $36,251,000 out of

amounts in the General Fund of the Treasury to carry out the amendments to section 505 made by section 5101(1). This amount is divided into six separate accounts which are established for the purposes of funding payments to different types of eligible manufacturers.

A claimant is no longer required to submit entry summary documentation to substantiate a claim. Rather, a claimant must make a claim for each claim year by submitting a signed affidavit to Customs, with return address clearly marked, that attests to the affiant's status as an eligible manufacturer. Claimants must submit affidavits by specific dates designated in the statute. Eligible U.S. manufacturers of men's or boys' suits, suit-type jackets and trousers, and eligible U.S. importing-manufacturers of wool fabric and wool yarn, must submit their claims to Customs postmarked so that they are received by Customs no later than August 21, 2002. Eligible U.S. non-importing manufacturers of wool fabric and wool yarn must submit their claims so that Customs receives them no later than September 20, 2002.

II. Definition of "manufacturer" added to section 505

Section 5101 adds a new paragraph (g) to section 505 that sets forth the definition of manufacturer for purposes of the statute. The definition authorizes the party that owns specified types of wool imports at the time the imports are processed into designated products in the United States to be eligible to receive a payment. This definition permits manufacturers who either import the specified wool products directly or purchase the specified imports to be eligible. Additionally, the definition includes manufacturers who perform their own processing operations in the United States, as well as manufacturers who contract the work out to a U.S. processing facility, so long as in both instances the manufacturer retains ownership of the wool imports at the time of processing.

III. New class of manufacturer eligible to receive payment

The original terms of section 505(b) and (c) required that a manufacturer of wool fabric or yarn be the importer of the wool inputs used in the manufacturer of the finished product in order to receive a refund. Therefore, non-importing manufacturers of wool fabric and yarn were ineligible for a refund.

Pursuant to section 505(g)(2) and (3), *non-importing* manufacturers of wool fabric and yarn are now eligible to receive a payment. In order to be eligible to claim a payment, Customs must receive documentation from a non-importing manufacturer of wool fabric or yarn by September 20, 2002, that establishes the amount the manufacturer paid for eligible wool products in 1999. This information will be used by Customs to determine the non-importing manufacturer's *pro rata* share of the fund established for this class of claimant.

NEW ADDRESS TO SEND DOCUMENTATION PERTAINING TO WOOL PAYMENTS

As sections 5101 and 5102 are detailed and clear, Customs will not issue regulations to implement the wool duty payment program as

amended (and 19 CFR 10.184 is superseded by statute). Accordingly, manufacturers are directed to follow the statutory procedures to claim a payment. While self-effectuating, section 505, as amended, does not state where claims and other documentation are to be sent. This document provides notice that claimants must send all statutorily required documentation pertaining to wool duty payments, including any additional information deemed necessary by Customs, to the U.S. Customs Service, Office of Field Operations, Wool Duty Payment Unit, 5th Floor, Attention: Debbie Scott, 1300 Pennsylvania Avenue, N.W., 5th Floor, Washington, D.C. 20229.

ADDITIONAL WOOL DUTY PAYMENTS

Section 5102(c) of the Trade Act of 2002 authorizes Customs to pay each eligible manufacturer that receives a payment for calendar year 2002 under section 505, as amended, two additional payments. To claim the additional payments, a manufacturer must submit a signed affidavit to the U.S. Customs Service, Office of Field Operations, Wool Duty Payment Unit, 5th Floor, Attention: Debbie Scott, 1300 Pennsylvania Avenue, N.W., 5th Floor, Washington, D.C. 20229, for each additional claim year, attesting that the affiant remains a manufacturer in the United States as of January 1 of the additional claim year for which a payment is being sought. Each additional payment will be in an amount equal to the amount received by the claimant for calendar year 2002. The additional payments will be paid out in two installments: the first installment will be made by Customs after January 1, 2004, but on or before April 15, 2004, and; the second installment will be paid by Customs after January 1, 2005, but on or before April 15, 2005.

THE STATUTE AS AMENDED

Section 505, as amended, is set forth below in its entirety for ease of reference.

SEC. 505.

(a) WORSTED WOOL FABRICS.—For each of the calendar years 2000, 2001, and 2002, a manufacturer of men's or boys' suits, suit-type jackets, or trousers (not a broker or other individual acting on of the manufacturer to process the import) of imported worsted wool fabrics of the kind described in heading 9902.51.11 or 9902.51.12 of the Harmonized Tariff Schedule of the United States shall be eligible for a payment equal to an amount determined pursuant to subsection (d)(1).

(b) WOOL YARN.—(1) *Importing Manufacturers.*—For each of the calendar years 2000, 2001, and 2002, a manufacturer of worsted wool fabrics who imports wool yarn of the kind described in heading 5107.10 or 9902.51.13 of the Harmonized Tariff Schedule of the United States shall be eligible for a payment equal to an amount determined pursuant to subsection (d)(2).

(2) *Nonimporting Manufacturers.*—For each of the calendar years 2001 and 2002, any other manufacturer of worsted wool fabrics of imported wool yarn of the kind described in heading 5107.10

or 9902.51.13 of the Harmonized Tariff Schedule of the United States shall be eligible for a payment equal to an amount determined pursuant to subsection (d)(2).

(c) WOOL FIBER AND WOOL TOP.—(1) *Importing Manufacturers*.—For each of the calendar years 2000, 2001, and 2002, a manufacturer of wool yarn or wool fabric who imports wool fiber or wool top of the kind described in heading 5101.11, 5101.19, 5101.21, 5101.29, 5101.30, 5103.10, 5103.20, 5104.00, 5105.21, 5105.29, or 9902.51.14 of the Harmonized Tariff Schedule of the United States shall be eligible for a payment equal to an amount determined pursuant to subsection (d)(3).

(2) *Nonimporting Manufacturers*.—For each of the calendar years 2001 and 2002, any other manufacturer of wool yarn or wool fabric of imported wool fiber or wool top of the kind described in heading 5101.11, 5101.19, 5101.21, 5101.29, 5101.30, 5103.10, 5103.20, 5104.00, 5105.21, 5105.29, or 9902.51.14 of the Harmonized Tariff Schedule of the United States shall be eligible for a payment equal to an amount determined pursuant to subsection (d)(3).

(d) AMOUNT OF ANNUAL PAYMENTS TO MANUFACTURERS.—

(1) *Manufacturers of men's suits, etc., of imported worsted wool fabrics*.—

(A) *Eligible to receive more than $5,000*.—Each annual payment to manufacturers described in subsection (a) who, according to the records of the Customs Service as of September 11, 2001, are eligible to receive more than $5,000 for each of the calendar years 2000, 2001, and 2002, shall be in an amount equal to one-third of the amount determined by multiplying $30,124,000 by a fraction—

(i) The numerator of which is the amount attributable to the duties paid on eligible wool products imported in calendar year 1999 by the manufacturer making the claim, and

(ii) The denominator of which is the total amount attributable to the duties paid on eligible wool products imported in calendar year 1999 by all the manufacturers described in subsection (a) who, according to the records of the Customs Service as of September 11, 2001, are eligible to receive more than $5,000 for each such calendar year under this section as it was in effect on that date.

(B) *Eligible wool products*.—For purposes of subparagraph (A), the term 'eligible wool products' refers to imported worsted wool fabrics described in subsection (a).

(C) *Others*.—All manufacturers described in subsection (a), other than the manufacturers to which subparagraph (A) applies, shall each receive an annual payment in an amount equal to one-third of the amount determined by dividing $1,665,000 by the number of all such other manufacturers.

(2) *Manufacturers of worsted wool fabrics of imported wool yarn*.—

(A) *Importing manufacturers*.—Each annual payment to an importing manufacturer described in subsection (b)(1) shall be in an amount equal to one-third of the amount determined by multiplying $2,202,000 by a fraction—

(i) The numerator of which is the amount attributable to the duties paid on eligible wool products imported in calendar year 1999 by the importing manufacturer making the claim, and

(ii) The denominator of which is the total amount attributable to the duties paid on eligible wool products imported in calendar year 1999 by all the importing manufacturers described in subsection (b)(1).

(B) *Eligible wool products.*—For purposes of subparagraph (A), the term 'eligible wool products' refers to imported wool yarn described in subsection (b)(1).

(C) *Nonimporting manufacturers.*—Each annual payment to a nonimporting manufacturer described in subsection (b)(2) shall be in an amount equal to one-half of the amount determined by multiplying $141,000 by a fraction—

(i) The numerator of which is the amount attributable to the purchases of imported eligible wool products in calendar year 1999 by the nonimporting manufacturer making the claim, and

(ii) The denominator of which is the total amount attributable to the purchases of imported eligible wool products in calendar year 1999 by all the nonimporting manufacturers described in subsection (b)(2).

(3) *Manufacturers of wool yarn or wool fabric of imported wool fiber or wool top.*—

(A) *Importing manufacturers.*—Each annual payment to an importing manufacturer described in subsection (c)(1) shall be in an amount equal to one-third of the amount determined by multiplying $1,522,000 by a fraction—

(i) The numerator of which is the amount attributable to the duties paid on eligible wool products imported in calendar year 1999 by the importing manufacturer making the claim, and

(ii) The denominator of which is the total amount attributable to the duties paid on eligible wool products imported in calendar year 1999 by all the importing manufacturers described in subsection (c)(1).

(B) *Eligible wool products.*—For purposes of subparagraph (A), the term 'eligible wool products' refers to imported wool fiber or wool top described in subsection (c)(1).

(C) *Nonimporting manufacturers.*—Each annual payment to a nonimporting manufacturer described in subsection (c)(2) shall be in an amount equal to one-half of the amount determined by multiplying $597,000 by a fraction—

(i) The numerator of which is the amount attributable to the purchases of imported eligible wool products in calendar year 1999 by the nonimporting manufacturer making the claim, and

(ii) The denominator of which is the amount attributable to the purchases of imported eligible wool products in calendar year 1999 by all the nonimporting manufacturers described in subsection (c)(2).

(4) *Letters of intent.*—Except for the nonimporting manufacturers described in subsections (b)(2) and (c)(2) who may make claims under this section by virtue of the enactment of the Wool Manufacturer Payment Clarification and Technical Corrections Act, only

manufacturers who, according to the records of the Customs Service, filed with the Customs Service before September 11, 2001, letters of intent to establish eligibility to be claimants are eligible to make a claim for a payment under this section.

(5) *Amount attributable to purchases by nonimporting manufacturers.*—

(A) *Amount attributable.*—For purposes of paragraphs (2)(C) and (3)(C), the amount attributable to the purchases of imported eligible wool products in calendar year 1999 by a nonimporting manufacturer shall be the amount the nonimporting manufacturer paid for eligible wool products in calendar year 1999, as evidenced by invoices. The nonimporting manufacturer shall make such calculation and submit the resulting amount to the Customs Service, within 45 days after the date of enactment of the Wool Manufacturer Payment Clarification and Technical Corrections Act, in a signed affidavit that attests that the information contained therein is true and accurate to the best of the affiant's belief and knowledge. The nonimporting manufacturer shall retain the records upon which the calculation is based for a period of five years beginning on the date the affidavit is submitted to the Customs Service.

(B) *Eligible wool product.*—For purposes of subparagraph (A)—

(i) The eligible wool product for nonimporting manufacturers of worsted wool fabrics is wool yarn of the kind described in heading 5107.10 or 9902.51.13 of the Harmonized Tariff Schedule of the United States purchased in calendar year 1999; and

(ii) The eligible wool products for nonimporting manufacturers of wool yarn or wool fabric are wool fiber or wool top of the kind described in heading 5101.11, 5101.19, 5101.21, 5101.29, 5101.30, 5103.10, 5103.20, 5104.00, 5105.21, 5105.29, or 9902.51.14 of such Schedule purchased in calendar year 1999.

(6) *Amount attributable to duties paid.*—For purposes of paragraphs (1), (2)(A), and (3)(A), the amount attributable to the duties paid by a manufacturer shall be the amount shown on the records of the Customs Service as of September 11, 2001, under this section as then in effect.

(7) *Schedule of payments; Reallocations.*—

(A) *Schedule.*—Of the payments described in paragraphs (1), (2)(A), and (3)(A), the Customs Service shall make the first and second installments on or before the date that is 45 days after the date of enactment of the Wool Manufacturer Payment Clarification and Technical Corrections Act, and the third installment on or before April 15, 2003. Of the payments described in paragraphs (2)(C) and (3)(C), the Customs Service shall make the first installment on or before the date that is 120 days after the date of enactment of the Wool Manufacturer Payment Clarification and Technical Corrections Act, and the second installment on or before April 15, 2003.

(B) *Reallocations.*—In the event that a manufacturer that would have received payment under subparagraph (A) or (C) of paragraph (1), (2), or (3) ceases to be qualified for such payment as such a manufacturer, the amounts otherwise payable to the remaining manufacturers under such subparagraph shall be increased on a

pro rata basis by the amount of the payment such manufacturer would have received.

(8) *Reference.*—For purposes of paragraphs (1)(A) and (6), the 'records of the Customs Service as of September 11, 2001' are the records of the Wool Duty Unit of the Customs Service on September 11, 2001, as adjusted by the Customs Service to the extent necessary to carry out this section. The amounts so adjusted are not subject to administrative or judicial review.

(e) *Affidavits by Manufacturers.*—(1) *Affidavit Required.*—A manufacturer may not receive a payment under this section for calendar year 2000, 2001, or 2002, as the case may be, unless that manufacturer has submitted to the Customs Service for that calendar year a signed affidavit that attests that, during that calendar year, the affiant was a manufacturer in the United States described in subsection (a), (b), or (c).

(2) *Timing.*—An affidavit under paragraph (1) shall be valid—

(A) In the case of a manufacturer described in paragraph (1), (2)(A), or (3)(A) of subsection (d) filing a claim for a payment for calendar year 2000 or 2001, or both, only if the affidavit is postmarked no later than 15 days after the date of enactment of the Wool Manufacturer Payment Clarification and Technical Corrections Act; and

(B) In the case of a claim for a payment for calendar year 2002, only if the affidavit is postmarked no later than March 1, 2003.

(f) *Offsets.*—Notwithstanding any other provision of this section, any amount otherwise payable under subsection (d) to a manufacturer in calendar year 2001 and, where applicable, in calendar years 2002 and 2003, shall be reduced by the amount of any payment received by that manufacturer under this section before the enactment of the Wool Manufacturer Payment Clarification and Technical Corrections Act.

(g) *Definition.*—For purposes of this section, the manufacturer is the party that owns—

(1) Imported worsted wool fabric, of the kind described in heading 9902.51.11 or 9902.51.12 of the Harmonized Tariff Schedule of the United States, at the time the fabric is cut and sewn in the United States into men's or boys' suits, suit-type jackets, or trousers;

(2) Imported wool yarn, of the kind described in heading 5107.10 or 9902.51.13 of such Schedule, at the time the yarn is processed in the United States into worsted wool fabric; or

(3) Imported wool fiber or wool top, of the kind described in heading 5101.11, 5101.19, 5101.21, 5101.29, 5101.30, 5103.10, 5103.20, 5104.00, 5105.21, 5105.29, or 9902.51.14 of such Schedule, at the time the wool fiber or wool top is processed in the United States into wool yarn.

Dated: August 8, 2002.

JAYSON P. AHERN,
Assistant Commissioner,
Office of Field Operations.

[Published in the Federal Register, August 12, 2002 (67 FR 52520)]

DEPARTMENT OF THE TREASURY,
OFFICE OF THE COMMISSIONER OF CUSTOMS,
Washington, DC, August 14, 2002.

The following documents of the United States Customs Service, Office of Regulations and Rulings, have been determined to be of sufficient interest to the public and U.S. Customs Service field offices to merit publication in the CUSTOMS BULLETIN.

MICHAEL T. SCHMITZ,
Assistant Commissioner,
Office of Regulations and Rulings.

REVOCATION OF RULING LETTERS AND REVOCATION OF TREATMENT RELATING TO THE TARIFF CLASSIFICATION OF TIN-PLATED CONTAINERS WITH HANDLES AND HINGES NOT DESIGNED TO BE USED PRIMARILY AS SALES PACKING NOR DESIGNED AS TABLE, KITCHEN OR OTHER HOUSEHOLD ARTICLES OF IRON OR STEEL

AGENCY: U.S. Customs Service; Department of the Treasury.

ACTION: Notice of revocation of tariff classification ruling letters and revocation of treatment relating to the classification of tin-plated containers with handles and hinges, not designed to be used primarily as sales packing nor designed as table, kitchen or other household articles of iron or steel.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. 1625(c)) as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs is revoking two rulings relating to the tariff classification, under the Harmonized Tariff Schedule of the United States Annotated (HTSUSA), of tin-plated containers with handles and hinges, not designed to be used primarily as sales packing nor designed as table, kitchen or other household articles of iron or steel. Customs is also revoking any treatment previously accorded by it to substantially identical merchandise.

Notice of the proposed action was published in the CUSTOMS BULLETIN, Volume 36, Number 25, on June 19, 2002. The Customs Service received no comments in response to this notice.

EFFECTIVE DATE: This action is effective for merchandise entered or withdrawn from warehouse for consumption on or after October 28, 2002.

FOR FURTHER INFORMATION CONTACT: J. Steven Jarreau, Textiles Classification Branch: (202) 572–8817

SUPPLEMENTARY INFORMATION:

BACKGROUND

On December 8, 1993, Title VI (Customs Modernization), of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057) (hereinafter "Title VI"), became effective. Title VI amended many sections of the Tariff Act of 1930, as amended, and related laws. Two new concepts which emerge from the law are **"informed compliance"** and **"shared responsibility."** These concepts are premised on the idea that in order to maximize voluntary compliance with Customs laws and regulations, the trade community needs to be clearly and completely informed of its legal obligations. Accordingly, the law imposes a greater obligation on Customs to provide the public with improved information concerning the trade community's responsibilities and rights under the Customs and related laws. In addition, both the trade and Customs share responsibility in carrying out import requirements. For example, under section 484 of the Tariff Act of 1930, as amended, 19 U.S.C. 1484, the importer of record is responsible for using reasonable care to enter, classify and value imported merchandise, and provide any other information necessary to enable Customs to properly assess duties, collect accurate statistics and determine whether any other applicable legal requirement is met.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)) as amended by section 623 of Title VI, a notice was published in the CUSTOMS BULLETIN Volume 36, Number 25, on June 19, 2002, proposing to revoke Headquarters Ruling Letters (HQ) 961707 (Mar. 19, 1999) and HQ 964234 (April 23, 2001) relating to the tariff classification of tin-plated containers with handles and hinges, not designed to be used primarily as sales packing nor designed as table, kitchen or other household articles of iron or steel. The Customs Service received no comments in response to this notice.

The Customs Service in HQ 961707 and HQ 964234 classified tin-plated containers with handles and hinges, not designed to be used primarily as sales packing nor designed as table, kitchen or other household articles of iron or steel, pursuant to General Rule of Interpretation 1, in subheading 4202.19.0000, HTSUSA.

It is now Customs determination that tin-plated containers with handles and hinges, not designed to be used primarily as sales packing nor designed as table, kitchen or other household articles of iron or steel are properly classified, pursuant to General Rule of Interpretation 1, in subheading 7326.90.1000, HTSUSA. Headquarters Ruling Letter 965554, revoking HQ 961707, is set forth as "Attachment A" and Headquarters Ruling Letter 965555, revoking HQ 964234, is set forth as "Attachment B" to this document.

Although in this notice Customs is specifically referring to two Headquarters Ruling Letters, this notice covers any rulings on this merchan-

dise that may exist, but have not been specifically identified. Customs has undertaken reasonable efforts to search existing databases for rulings in addition to those identified. No further rulings have been found. Any party who has received an interpretive ruling or decision (*i.e.*, ruling letter, internal advice memorandum or decision or protest review decision) on the merchandise subject to this notice, which classified the merchandise contrary to this notice, should have advised Customs during the comment period.

Similarly, pursuant to section 625(c)(2), Tariff Act of 1930 (19 U.S.C. 1625(c)(2)) as amended by section 623 of Title VI, Customs is revoking any treatment previously accorded by Customs to substantially identical merchandise. This treatment may, among other reasons, be the result of the importer's reliance on a ruling issued to a third party, Customs personnel applying a ruling of a third party to importations of the same or similar merchandise, or the importer's or Customs previous interpretation of the HTSUSA. Any person involved with substantially identical merchandise should have advised Customs during the comment period. An importer's failure to have advised Customs of substantially identical merchandise or of a specific ruling not identified in this notice, may raise issues of reasonable care, on the part of the importers or their agents for importation of merchandise, subsequent to the effective date of the final decision on this notice.

Pursuant to 19 U.S.C. 1625(c)(1), Customs is revoking HQ 961707 and HQ 964234 and any other rulings not specifically identified to reflect the proper classification of the merchandise pursuant to the analysis set forth in HQ 965554 and HQ 965555. Additionally, pursuant to 19 U.S.C. 1625(c)(2), Customs is revoking any treatment previously accorded by Customs to substantially identical merchandise.

These rulings will become effective, in accordance with 19 U.S.C. 1625(c), sixty (60) days after publication in the CUSTOMS BULLETIN.

Dated: August 12, 2002.

JOHN ELKINS,
(for Myles B. Harmon, Acting Director,
Commercial Rulings Division.)

[Attachments]

[ATTACHMENT A]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, August 12, 2002.

CLA–2 RR:CR:TE 965554 jsj
Category: Classification
Tariff No. 7326.90.1000

MR. DAVID M. RICKERT
E. BESLER & COMPANY
PO. Box 66361
Chicago, IL 60666–0361

Re: Revocation of HQ 961707 (Mar. 19, 1999); Lunch Box Style Metal Container; With or Without a Roughneck Thermos®; Tin-plated Iron or Steel; Set; Subheading 7326.90.1000, HTSUSA.

DEAR MR. RICKETT:

The purpose of this correspondence is to advise you that the Customs Service has reconsidered Headquarters Ruling Letter (HQ) 961707 (Mar. 19, 1999) which was issued to you as a revocation of Port Decision C85024 (Mar. 31, 1998).

Headquarters Ruling Letter 961707 classified a metal container in the shape of traditional school lunch box in subheading 4202.19.0000, HTSUSA. We have reviewed that ruling and found it to be in error. The Customs Service is reclassifying the merchandise in subheading 7326.90.1000, HTSUSA. This ruling, therefore, revokes HQ 961707.

Pursuant to section 625 (c), Tariff Act of 1930, as amended, 19 U.S.C. 1625 (c), notice of the proposed revocation of HQ 961707 was published on June 19, 2002, in the CUSTOMS BULLETIN, Volume 36, Number 25.

Facts:

The article subject to this reconsideration is a container that has the shape of a traditional school lunch box. It measures nine (9) inches in height, seven (7) inches in length and four (4) inches in width. It is composed of metal. Customs is issuing this revocation on the assumption that the article is tin-plated. No laboratory analysis has been performed to determine its precise composition.

The item has a secured top closure and a single carrying handle. It is not insulated. Customs is advised that it may be imported with or without a ten ounce "roughneck bottle" inside. No details regarding the construction of the bottle have been provided. Customs is advised that the country of manufacture is China.

Issue:

What is the classification, pursuant to the Harmonized Tariff Schedule of the United States Annotated, of the above-described lunch box style metal container with a handle and a latch, imported with or without a bottle?

Law and Analysis:

The federal agency responsible for initially interpreting and applying the Harmonized Tariff Schedule of the United States Annotated (HTSUSA) is the U.S. Customs Service.[1] The Customs Service, in accordance with its legislative mandate, classifies imported merchandise pursuant to the General Rules of Interpretation (GRI) and the Additional U.S. Rules of Interpretation.[2]

General Rule of Interpretation 1 provides, in part, that classification decisions are to be "determined according to the terms of the headings and any relative section or chapter notes." *General Rule of Interpretation 1*. General Rule of Interpretation 1 further states that merchandise which cannot be classified in accordance with the dictates of GRI 1

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[1] *See* 19 U.S.C. 1500 (West 1999) (providing that the Customs Service is responsible for fixing the final appraisement, classification and amount of duty to be paid); *See also* Joint Explanatory Statement of the Committee of Conference, H.R. Conf. Rep. No. 100–576, at 549 (1988) *reprinted in* 1988 U.S. Code Cong. and Adm. News 1547, 1582 [hereinafter Joint Explanatory Statement].

[2] *See* 19 U.S. C. 1202 (West 1999); *See generally, What Every Member of The Trade Community Should Know About: Tariff Classification*, an Informed Compliance Publication of the Customs Service available on the World Wide Web site of the Customs Service at www.customs.gov, search "Importing & Exporting" and then "U.S. Customs Informed Compliance Publications."

should be classified pursuant to the other General Rules of Interpretation, provided the HTSUSA chapter headings or notes do not require otherwise. According to the Explanatory Notes (EN), the phrase in GRI 1, "provided such headings or notes do not otherwise require," is intended to "make it quite clear that the terms of the headings and any relative Section or Chapter Notes are paramount." *General Rules for the Interpretation of the Harmonized System, Rule 1, Explanatory Note (V).*

The Explanatory Notes constitute the official interpretation of the Harmonized System at the international level. *See* Joint Explanatory Statement *supra* note 1, at 549. The Explanatory Notes, although neither legally binding nor dispositive of classification issues, do provide commentary on the scope of each heading of the HTSUS. The EN are generally indicative of the proper interpretation of the headings. *See* T.D. 89–80, 54 Fed. Reg. 35127–28 (Aug. 23, 1989); *Lonza, Inc. v. United States*, 46 F. 3rd 1098, 1109 (Fed. Cir. 1995).

Commencing classification of the metal container in accordance with the dictates of GRI 1, the Customs Service examined the headings of Chapter 73, *Articles of Iron or Steel*, of the HTSUSA. Customs concludes the lunch box style container subject to this reconsideration is properly classified in heading 7326, HTSUSA, pursuant to GRI 1. Heading 7326, HTSUSA, more specifically than any other heading in the tariff schedule, describes the container.

Customs notes that heading 7326, HTSUSA, which covers "Other articles of iron or steel," is a residual or basket provision into which merchandise of iron or steel not described by any other heading of Chapter 73 is classified. Although the classification decision arrived at by this office relies on General Rule of Interpretation 1, this determination was made by a process of elimination, only subsequent to considering all of the other headings of Chapter 73, particularly headings 7310, HTSUSA, and 7323, HTSUSA.

Heading 7310, HTSUSA, provides for "Tanks, casks, drums, cans, boxes and similar containers, for any material (other than compressed or liquefied gas), of iron or steel, of a capacity not exceeding 300 liters, whether or not lined or heat insulated, but not fitted with mechanical or thermal equipment." The EN to heading 7310, HTSUSA, Explanatory Note 73.10, provides an illustrative list of "larger containers," as well as "smaller containers" that are properly classified in heading 7310, HTSUSA. *Explanatory Note 73.10.* The smaller containers "include boxes, cans, tins, etc." and are "*mainly used as sales packings* for butter, milk, beer, preserves, fruit or fruit juices, biscuits, tea, confectionery, tobacco, cigarettes, shoe cream, medicaments, etc." (Emphasis added) *Explanatory Note 73.10.*

Although the container subject to this reconsideration falls within the EN description of "boxes, cans, tins, etc.," it is not "mainly used as sales packings." *Explanatory Note 73.10.* The container in issue, although it may be used as packing for candy or other merchandise, has uses beyond sales packing. Customs will not suggest the numerous uses to which this container may be put, but is of the conclusion that this container is significantly distinct from sales packing, precluding its classification in heading 7310, HTSUSA. *See generally* HQ 963670 (April 12, 2002) (discussing merchandise classified in heading 7310, HTSUSA, and providing a list of precedential Customs Service ruling letters).

Heading 7323, HTSUSA, provides, in pertinent part, for the classification of "Table, kitchen or other household articles and parts thereof, of iron or steel." The Explanatory Notes to heading 7323, HTSUSA, state that this group "comprises a wide range of iron or steel articles0used for table, kitchen or other household purposes * * *." *Explanatory Note 73.23.* The EN further provides an extensive list of articles considered being for kitchen, table and other household uses. *See Explanatory Note 73.23.* Kitchen articles include items "such as saucepans, steamers * * *; frying pans * * *; kettles; colanders; * * * jelly or pastry moulds; * * * kitchen storage tins and canisters * * * funnels." *Explanatory Note 73.23(A)(1).* Articles for table use include "trays, dishes, plates * * * sugar basins, butter dishes * * * coffee pots * * * tea pots; cups, mugs * * * cruets; knife-rests; * * * serviette rings, table cloth clips." *Explanatory Note 73.23(A)(2).* Items enumerated as "other household articles" encompass articles such as "wash coppers and boilers; dustbins, buckets * * * watering-cans; ash-trays; * * * baskets for laundry, fruit, vegetables, etc.; letter-boxes * * * luncheon boxes." *Explanatory Note 73.23(A)(3).*

It is the conclusion of the Customs Service, subsequent to a review of this list, that the container subject to this reconsideration, a school lunch box, is not analogous to the articles enumerated in EN 73.23. Merchandise properly classified in heading 7323, HTSUSA, is limited in scope to table, kitchen or other household articles made of iron or steel. The container under review in this reconsideration may not reasonably be described as a table, kitchen or household article. *See generally* HQ 956218 (Aug. 23, 1994), New York

Ruling Letter (NY) C88472 (June 24, 1998), NY 813291 (Aug. 23, 1995) and NY 808180 (Mar. 24, 1995). The container subject to this reconsideration may be used around the home, but it is not designed nor specifically intended for table, kitchen or household use, precluding classification in heading 7323, HTSUSA.

It is Customs determination that the heading that is most descriptive of the lunch box container is heading 7326, HTSUSA. Heading 7326, HTSUSA, provides very simply for "Other articles of iron or steel." Heading 7326, HTSUSA, as previously stated is a residual provision and encompasses the classification of "all iron or steel articles * * * **other than** articles included in the preceding headings of this Chapter or * * * more specifically covered elsewhere in the Nomenclature." *Explanatory Note 73.26.*

Understanding that heading 7326, HTSUSA, is a residual or basket provision into which all merchandise properly classified in Chapter 73, HTSUSA, falls by default when a more descriptive heading in the chapter does not exist, the variety of iron or steel merchandise that is properly classified in heading 7326, HTSUSA, is broad. This is confirmed by a further reading of the Explanatory Notes. The Explanatory Note that corresponds to heading 7326, HTSUSA, Explanatory Note 73.26, offers an extensive listing of merchandise that is classified in heading 7326, HTSUSA.

Explanatory Note 73.26 (3) provides that heading 7326, HTSUSA, covers "Certain boxes and cases, *e.g.*, tool boxes or cases, not specially shaped or internally fitted to contain particular tools with or without their accessories (see the Explanatory Note to heading 42.02); botanists', *etc.*, collection or specimen cases, trinket boxes; cosmetic or powder boxes and cases; cigarette cases, tobacco boxes, cachou boxes, *etc.*, but **not including** containers of **heading 73.10,** household containers **(heading 73.23),** nor ornaments **(heading 83.06).**" (Emphasis added). The container subject to this reconsideration is not easily analogized to the "boxes and cases" specifically identified in the EN, but this is not necessary. The drafters of the EN, by employing the abbreviations "e.g." and "etc." in EN 73.26, exhibited an intent that the identified articles were only intended to be representative or illustrative.

It is the conclusion of the Customs Service that the lunch box container in issue and the articles identified by example in EN 73.26 share enough common features to warrant the classification of it in heading 7326, HTSUSA. The container in issue is essentially a metal box, the size of which according to a reading of EN 73.26 may vary significantly. The container is larger than trinket and cachou boxes, but smaller than tool boxes. It is not specially shaped nor is it internally fitted. The possible uses of the container are similar to the anticipated uses of the containers referenced in the EN. It may carry a variety of items, none of which fall into any particular category that might preclude classification in heading 7326, HTSUSA. As should be appreciated, there is no single example provided for in EN 73.26 to which Customs may point as the perfect example of a container similar to the one subject to this reconsideration. Customs has, however, demonstrated that there are a significant number of common characteristics between the container in issue and the "boxes and cases" illustrated in Explanatory Note 73.26 to warrant classification in heading 7326, HTSUSA.

Although Customs has discussed the similarities between the relevant merchandise and the items identified in the Explanatory Notes to heading 7326, HTSUSA, it is important to remember that since heading 7326, HTSUSA, is a basket or residual provision it is only necessary to determine that the Thermos® merchandise is not excluded from heading 7326, HTSUSA, nor specifically provided for elsewhere in the tariff schedule. Customs concludes that the merchandise is not precluded from classification in heading 7326, HTSUSA, nor is it specifically provided for in another tariff schedule heading.

Continuing the classification of the school lunch box style container at the subheading level, the container is classified in subheading 7326.90.1000, HTSUSA. *See generally* NY H81764 (June 19, 2001), NY F81395 (Jan. 13, 2000) and NY B80840 (Jan. 10, 1997). Subheading 7326.90.1000, HTSUSA, provides for the classification of

7326	Other articles of iron or steel:
7326.90	Other:
7326.90.1000	Of tinplate.

The Customs Service specifically notes for the attention of the importer and the customs broker that Customs has not undertaken a laboratory analysis to confirm that the container in issue is tin-plated. Should the container not prove to be tin-plated, this would significantly impact the classification and rate of duty of this merchandise. *See* HQ 965063

(April 12, 2002) (a binding classification ruling classifying similar merchandise said to be tin-plated).

Should this container not be tin-plated, it would be classified in subheading 7326.90.8586, HTSUSA. Subheading 7326.90.8586, HTSUSA, provides for:

7326	Other articles of iron or steel:
7326.90	Other:
	Other:
	Other:
7326.90.85	Other,
7326.90.8586	Other.

It is noted that Customs, in PD C85024 and HQ 961707, classified this item in heading 4202, HTSUSA. Heading 4202, HTSUSA, provides for the classification of:

> Trunks, suitcases, vanity cases, attache cases, briefcases, school satchels, spectacle cases, binocular cases, camera cases, musical instrument cases, gun cases, holsters and similar containers; traveling bags, insulated food or beverage bags, toiletry bags, knapsacks and backpacks, handbags, shopping bags, wallets, purses, map cases, cigarette cases, tobacco pouches, tool bags, sports bags, bottle cases, jewelry boxes, powder cases, cutlery cases and similar containers, of leather or of composition leather, of sheeting of plastics, of textile materials, of vulcanized fiber, or of paperboard, or wholly of mainly covered with such materials or with paper.

Customs, during the course of this reconsideration, determined that the merchandise in issue was not similar to the items designated by name in the first part of heading 4202, HTSUSA, that aspect which precedes the semi-colon. It was also determined that consideration of the items listed in the second part of the heading was unnecessary because those articles must be made of specific materials and iron and steel, of which the instant merchandise is composed, are not enumerated materials. Since Customs determined that the metal container imported by Thermos® is not similar to the containers designated *eo nomine* in heading 4202, HTSUSA, Customs re-examined the headings of the HTSUSA and has concluded that the lunch box style container is properly classified in heading 7326, HTSUSA.

The Customs Service, in addition to having been requested to provide a binding classification ruling for the lunch box style container, was also requested to provide a ruling on the container when imported with the "roughneck" bottle. Customs, in examining this question, considered whether the container and the bottle were a "set" pursuant to GRI 3.

An examination of GRI 3 becomes appropriate when goods are *prima facie* classifiable under two or more headings. The container is classified in heading 7326, HTSUSA, and although the ruling request did not provide sufficient information to classify the bottle, Customs will assume that the bottle is classifiable in a different heading.

Continuing with the application of General Rule of Interpretation 3, GRI 3(a) provides that the articles should be classified according to the heading which affords the most specific description, unless the multiple headings under consideration refer to only part of the materials or substances contained in goods that are mixed or composite, or to only part of "items in a set put up for retail sale." The container and the bottle are not mixed or composite goods, warranting inquiry into the issue of whether they cumulatively constitute "items in a set put up for retail sale."[3] *General Rule of Interpretation 3.*

The General Rules of Interpretation do not define the phrase "items in a set put up for retail sale." The Explanatory Notes do, however, offer guidance. The precise phrase in GRI 3(a) "items in a set put up for retail sale" is not addressed in the EN. The EN do, however, address a similar phrase employed in GRI 3(b). The phrase employed in GRI 3(b) and discussed in the EN is "goods put up in sets for retail sale." *General Rules for the Interpretation of the Harmonized System, Rule 3(b), Explanatory Note (X).* It is the conclusion of the Customs Service that the two phrases address the same issue.

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[3] *See generally, What Every Member of The Trade Community Should Know About: Classification of Sets Under the HTS*, an Informed Compliance Publication of the Customs Service available on the World Wide Web site of the Customs Service at www.customs.gov, search "Importing & Exporting" and then "U.S. Customs Informed Compliance Publications."

Explanatory Note (X) to GRI 3(b) provides three factors to be considered when determining whether goods have been put up in sets for retail sale. The term is taken to mean goods which:

> (a) consist of at least two different articles that are, *prima* facie, classifiable in different headings * * *.
> (b) consist of * * * articles put up together to meet a particular need or carry out a specific activity; and
> (c) are put up in a manner suitable for sale directly to users without repacking * * *. [*General Rules for the Interpretation of the Harmonized System, Rule 3(b), Explanatory Note (X) (a)–(c)*].

A review of the HTSUSA and an examination of the container and the bottle establish that they are *prima facie* classifiable in different headings and are packaged in a manner suitable for sale directly to users. The issue that remains, the second of the three factors, is whether the articles as put up together "meet a particular need or carry out a specific activity." *General Rules for the Interpretation of the Harmonized System, Rule 3(b), Explanatory Note (X)(b).*

The Explanatory Notes do not define the phrase "meet a particular need or carry out a specific activity." *Id.* The EN do, however, offer examples of items put up together for sale directly to the user which constitute sets. The initial example consists of "a sandwich made of beef, with or without cheese, in a bun * * * packaged with potato chips (French Fries) * * *." *General Rules for the Interpretation of the Harmonized System, Rule 3(b), Explanatory Note (X)(1)(a).* The second example consists of items to be used together to prepare a spaghetti meal. The components include: (1) A packet of uncooked spaghetti; (2) A sachet of grated cheese; and (3) A small tin of tomato sauce, put up in a carton. *See General Rules for the Interpretation of the Harmonized System, Rule 3(b), Explanatory Note (X)(1)(b).* The third example is a hairdressing set. The items in this set include: (1) A pair of electric hair clippers; (2) A comb; (3) A pair of scissors; (4) A brush; (5) A towel of textile material; and (6) a leather case to store and carry the items. *See General Rules for the Interpretation of the Harmonized System, Rule 3(b), Explanatory Note (X)(2).* The final example of a set is a drawing kit. The drawing kit includes five items put up together in a case of plastic sheeting. The items are: (1) A ruler; (2) A disc calculator; (3) A drawing compass; (4) A pencil; and (5) A pencil-sharpener, put up in a case of plastic sheeting. *See General Rules for the Interpretation of the Harmonized System, Rule 3(b), Explanatory Note (X)(3).*

A review of each of the examples of sets in EN (X) indicates that components of sets share at lease one common trait. *See* HQ 953472 (Mar. 21,1994). The fact that the drafters of EN (X) did not explain when goods put up together "meet a particular need or carry out a specific purpose" suggests that resolution of the issue must be determined by analogy on a case-by-case basis.

The items that comprise each example of a set in EN (X) are related to one another in such a fashion that they interact together to serve a distinct purpose or function to enable a singular result to be achieved. The items in examples one and two are used in conjunction with one another to complete a sandwich meal and prepare a spaghetti meal. The articles in example three are used together for the purpose of hair grooming and the items in example four function with one another to enable the user to draw.

The Explanatory Notes, in addition to offering examples of items that constitute sets, also provides examples of collections of articles which do not function with one another to the degree necessary to establish a set. The initial accumulation of items in EN (X) consists of a can of shrimp, a can of *pate de foie*, a can of cheese, a can of sliced bacon and a can of cocktail sausages. *See General Rules for the Interpretation of the Harmonized System, Rule 3(b), Explanatory Note (X)(1).* The second example includes a bottle of spirits and a bottle of wine. *See id.* The items in the first example, although related to one another and usable together, do not "interact with one another so as to comprise a single dish." HQ 953472 *supra*. It was concluded in HQ 953472 that the wine and spirits example did not constitute a set because the items would not be used together for the mixing of a single drink nor be suitable for serving together on a particular occasion.[4] *See* HQ 953472 *Id.*

The issue in the instant ruling is whether the container has a nexus with the bottle such that both are intended to be used together or in conjunction with one another to meet a

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[4] It should be noted that the Explanatory Notes of the Harmonized Commodity Description and Coding System are an international document that employs words, phrases and understandings which are intended to have a universal international meaning that may be different from the domestic meaning or understanding of a particular member-country or member-countries of the World Customs Organization.

particular need or carry out a specific activity. It is the conclusion of the Customs Service that the metal container and the bottle will be used together or in conjunction with one another to meet a particular need or carry out a specific activity. The container provides a means of packing and transporting food and snacks and will be used with the bottle that will enable the user to store and transport a beverage. Customs understands that the food and beverage will be enjoyed at the same time and the container accompanied by the bottle facilitates this enjoyment. The container and the bottle function together to further a specific activity, the storage, transportation and enjoyment of food and beverage. They are a "set" pursuant to General Rule of Interpretation 3(b). *See Generally* HQ 088134 (Sept. 22, 1989) and HQ 959305 (Sept. 20, 1996).

General rule of interpretation 3(b) additionally provides that goods put up in sets for retail sale shall be classified as if they consisted of that component of the set that gives the set its "essential character." The General Rules of Interpretation do not define the phrase "essential character," but the Explanatory Notes offer a non-exhaustive list of factors which may be considered. The factors include: (1) The nature of the component; (2) Its bulk; (3) Its quantity; (4) Its weight; (5) Its value; and (6) The role of the component in relation to the use of the goods. *See General Rules for the Interpretation of the Harmonized System, Rule 3(b), Explanatory Note (VIII).* Explanatory Note (VIII) to GRI 3(b) specifically states that the essential character of a set will "vary between different kinds of goods." *Id.*

It is the conclusion of Customs that the lunch box style container provides the set with its essential character. The role of the lunch box is more fundamental to the set than the bottle. The container enables both the food items stored in the container and the beverage stored in the bottle to be transported. The role of the lunch box container, as previously stated in HQ 961707, is paramount to the overall use of both the container and the bottle.

Holding:

Headquarters Ruling Letter 961707 is hereby revoked.

The tin-plated container with a hinge and a handle in the shape of a school lunch box, when imported separately, is classified in subheading 7326.90.1000, Harmonized Tariff Schedule of the United States Annotated.

The tin-plated container with a hinge and a handle in the shape of a school lunch box, when imported with the roughneck bottle, is classified as a set pursuant to General Rule of Interpretation 3(b).

The container provides the set with its essential character and the container and bottle set is classified in subheading 7326.90.1000, Harmonized Tariff Schedule of the United States Annotated.

The General Column 1 Rate of Duty for merchandise classified in subheading 7326.90.1000, HTSUSA, is FREE.

This ruling, in accordance with 19 U.S.C. 1625 (c), will become effective sixty (60) days after its publication in the CUSTOMS BULLETIN.

JOHN ELKINS,
(for Myles B. Harmon, Acting Director,
Commercial Rulings Division.)

[ATTACHMENT B]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, August 12, 2002.

CLA-2 RR:CR:TE 965555 jsj
Category: Classification
Tariff No. 7326.90.1000

MS. KATHY M. BELAS
JAMES G. WILEY CO.
P.O. Box 90008
Los Angeles, CA 90009-0008

Re: Revocation of HQ 964234 (April 23, 2001); "Lunch Tote"; Lunch Box Style Metal Container; Tin-plated Iron or Steel; Subheading 7326.90.1000, HTSUSA.

DEAR MS. BELAS:

The purpose of this correspondence is to advise you that the Customs Service has reconsidered Headquarters Ruling Letter (HQ) 964234 (April 23, 2001) issued to you as the customhouse broker of Dorothy Thorpe/Christmas Corner.

Headquarters Ruling Letter 964234 classified a metal container in the shape of traditional school lunch box, only smaller, in subheading 4202.19.0000, HTSUSA. We have reviewed that ruling and found it to be in error. The Customs Service is reclassifying the merchandise in subheading 7326.90.1000, HTSUSA. This ruling, therefore, revokes HQ 964234.

Pursuant to section 625 (c), Tariff Act of 1930, as amended, 19 U.S.C. 1625 (c), notice of the proposed revocation of HQ 964234 was published on June 19, 2002, in the CUSTOMS BULLETIN, Volume 36, Number 25.

Facts:

The article subject to this reconsideration is a container that has the shape of a traditional school lunch box, only smaller. It measures seven and one-half (7-1/2) inches in length, three and one-eighth (3-1/8) inches in width and five and one-eighth (5-1/8) inches in height. It is composed of metal believed by the Customs Service to be sheet steel. The initial ruling request indicates that the item is made of tin. Customs is issuing this revocation on the assumption that the article is tin-plated. No laboratory analysis has been performed to determine its precise composition.

The item, described by the broker as a "lunch tote," has a plastic handle on top that swivels side to side. One side of the item opens and may be secured closed by a latch on the top. Attachments for a shoulder strap are located on the narrow or width sides, one and one-half (1-1/2) inches from the top. No shoulder straps accompanied the sample. It is not insulated and does not have an accompanying container or interior attachment designed to facilitate the transportation and storage of liquids. The Customs Service has not been advised of the country of manufacture.

Issue:

What is the classification, pursuant to the Harmonized Tariff Schedule of the United States Annotated, of the above-described, tin-plated, steel container with a handle and a latch?

Law and Analysis:

The federal agency responsible for initially interpreting and applying the Harmonized Tariff Schedule of the United States Annotated (HTSUSA) is the U.S. Customs Service.[1] The Customs Service, in accordance with its legislative mandate, classifies imported mer-

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[1] *See* 19 U.S.C. 1500 (West 1999) (providing that the Customs Service is responsible for fixing the final appraisement, classification and amount of duty to be paid); *See also* Joint Explanatory Statement of the Committee of Conference, H.R. Conf. Rep. No. 100-576, at 549 (1988) *reprinted in* 1988 U.S. Code Cong. and Adm. News 1547, 1582 [hereinafter Joint Explanatory Statement].

chandise pursuant to the General Rules of Interpretation (GRI) and the Additional U.S. Rules of Interpretation.[2]

General Rule of Interpretation 1 provides, in part, that classification decisions are to be "determined according to the terms of the headings and any relative section or chapter notes." *General Rule of Interpretation 1*. General Rule of Interpretation 1 further states that merchandise which cannot be classified in accordance with the dictates of GRI 1 should be classified pursuant to the other General Rules of Interpretation, provided the HTSUSA chapter headings or notes do not require otherwise. According to the Explanatory Notes (EN), the phrase in GRI 1, "provided such headings or notes do not otherwise require," is intended to "make it quite clear that the terms of the headings and any relative Section or Chapter Notes are paramount." *General Rules for the Interpretation of the Harmonized System, Rule 1, Explanatory Note (V)*.

The Explanatory Notes constitute the official interpretation of the Harmonized System at the international level. *See* Joint Explanatory Statement *supra* note 1, at 549. The Explanatory Notes, although neither legally binding nor dispositive of classification issues, do provide commentary on the scope of each heading of the HTSUS. The EN are generally indicative of the proper interpretation of the headings. *See* T.D. 89–80, 54 Fed. Reg. 35127–28 (Aug. 23, 1989); *Lonza, Inc. v. United States*, 46 F. 3rd 1098, 1109 (Fed. Cir. 1995).

Commencing classification of the tin-plated metal container in accordance with the dictates of GRI 1, the Customs Service examined the headings of Chapter 73, *Articles of Iron or Steel*, of the HTSUSA. Customs concludes the lunch box shaped container subject to this reconsideration is properly classified in heading 7326, HTSUSA, pursuant to GRI 1. Heading 7326, HTSUSA, more specifically than any other heading in the tariff schedule, describes the container.

Customs notes that heading 7326, HTSUSA, which covers "Other articles of iron or steel," is a residual or basket provision into which merchandise of iron or steel not described by any other heading of Chapter 73 is classified. Although the classification decision arrived at by this office relies on General Rule of Interpretation 1, this determination was made by a process of elimination, only subsequent to considering all of the other headings of Chapter 73, particularly headings 7310, HTSUSA, and 7323, HTSUSA.

Heading 7310, HTSUSA, provides for "Tanks, casks, drums, cans, boxes and similar containers, for any material (other than compressed or liquefied gas), of iron or steel, of a capacity not exceeding 300 liters, whether or not lined or heat insulated, but not fitted with mechanical or thermal equipment." The EN to heading 7310, HTSUSA, Explanatory Note 73.10, provides an illustrative list of "larger containers," as well as "smaller containers" that are properly classified in heading 7310, HTSUSA. *Explanatory Note 73.10*. The smaller containers "include boxes, cans, tins, etc." and are "mainly used as sales packings for butter, milk, beer, preserves, fruit or fruit juices, biscuits, tea, confectionery, tobacco, cigarettes, shoe cream, medicaments, etc." *Explanatory Note 73.10*.

Although the container subject to this reconsideration falls within the EN description of "boxes, cans, tins, etc.," it is not "mainly used as sales packings." *Explanatory Note 73.10*. The container in issue, although it may be used as packing for candy or other merchandise, has uses beyond sales packing. The broker's submission that accompanied the initial ruling request indicates that the item will function as a lunch box. Customs will not suggest the numerous uses to which this container may be put, but is of the conclusion that this container is significantly distinct from sales packing, precluding its classification in heading 7310, HTSUSA. *See generally* HQ 963670 (April 12, 2002) (discussing merchandise classified in heading 7310, HTSUSA, and providing a list of precedential Customs Service ruling letters).

Heading 7323, HTSUSA, provides, in pertinent part, for the classification of "Table, kitchen or other household articles and parts thereof, of iron or steel." The Explanatory Notes to heading 7323, HTSUSA, state that this group "comprises a wide range of iron or steel articles * * * used for table, kitchen or other household purposes * * *." *Explanatory Note 73.23*. The EN further provides an extensive list of articles considered being for kitchen, table and other household uses. *See Explanatory Note 73.23*. Kitchen articles include items "such as saucepans, steamers * * *; frying pans * * *; kettles; colanders; * * * jelly or pastry moulds; * * * kitchen storage tins and canisters * * * funnels." *Explanatory*

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[2] *See* 19 U.S. C. 1202 (West 1999); *See generally, What Every Member of The Trade Community Should Know About: Tariff Classification*, an Informed Compliance Publication of the Customs Service available on the World Wide Web site of the Customs Service at www.customs.gov, search "Importing & Exporting" and then "U.S. Customs Informed Compliance Publications."

Note 73.23(A)(1). Articles for table use include "trays, dishes, plates * * * sugar basins, butter dishes * * * coffee pots * * * tea pots; cups, mugs * * * cruets; knife rests; * * * serviette rings, table cloth clips." *Explanatory Note 73.23(A)(2)*. Items enumerated as "other household articles" encompass articles such as "wash coppers and boilers; dustbins, buckets * * * watering cans; ash-trays; * * * baskets for laundry, fruit, vegetables, etc.; letterboxes * * * luncheon boxes." *Explanatory Note 73.23(A)(3)*.

It is the conclusion of the Customs Service, subsequent to a review of this list, that the "lunch tote" container subject to this reconsideration is not analogous to the above articles. Merchandise properly classified in heading 7323, HTSUSA, is limited in scope to table, kitchen or other household articles made of iron or steel. The container under review in this reconsideration may not reasonably be described as a table, kitchen or household article. *See generally* HQ 956218 (Aug. 23, 1994), New York Ruling Letter (NY) C88472 (June 24, 1998), NY 813291 (Aug. 23, 1995) and NY 808180 (Mar. 24, 1995). The container subject to this reconsideration may be used around the home, but it is not designed nor specifically intended for table, kitchen or household use, precluding classification in heading 7323, HTSUSA.

It is Customs determination that the heading that is most descriptive of the lunch box style container is heading 7326, HTSUSA. Heading 7326, HTSUSA, provides very simply for "Other articles of iron or steel." Heading 7326, HTSUSA, as previously stated is a residual provision and encompasses the classification of "all iron or steel articles * * * **other than** articles included in the preceding headings of this Chapter or * * * more specifically covered elsewhere in the Nomenclature." *Explanatory Note 73.26*.

Understanding that heading 7326, HTSUSA, is a residual or basket provision into which all merchandise properly classified in Chapter 73, HTSUSA, falls by default when a more descriptive heading in the chapter does not exist, the variety of iron or steel merchandise that is properly classified in heading 7326, HTSUSA, is broad. This is confirmed by a further reading of the Explanatory Notes. The Explanatory Note that corresponds to heading 7326, HTSUSA, Explanatory Note 73.26, offers an extensive listing of merchandise that is classified in heading 7326, HTSUSA.

Explanatory Note 73.26 (3) provides that heading 7326, HTSUSA, covers "Certain boxes and cases, *e.g.*, tool boxes or cases, not specially shaped or internally fitted to contain particular tools with or without their accessories (see the Explanatory Note to heading 42.02); botanists', *etc.*, collection or specimen cases, trinket boxes; cosmetic or powder boxes and cases; cigarette cases, tobacco boxes, cachou boxes, *etc.*, but **not including** containers of **heading 73.10,** household containers **(heading 73.23),** nor ornaments **(heading 83.06).**" (Emphasis added). The container subject to this reconsideration is not easily analogized to the "boxes and cases" specifically identified in the EN, but this is not necessary. The drafters of the EN, by employing the phrases abbreviated "e.g." and "etc." in EN 73.26, exhibited an intent that the identified articles were only intended to be representative or illustrative.

It is the conclusion of the Customs Service that the container in issue and the articles identified by example in EN 73.26 share enough common features to warrant the classification of the "lunch tote" in heading 7326, HTSUSA. The container in issue is essentially a steel box, the size of which according to a reading of EN 73.26 may vary significantly. The container is larger than trinket and cachou boxes, smaller than tool boxes, but is about the size of powder or tobacco boxes. It is not specially shaped nor is it internally fitted. The possible uses of the container are similar to the anticipated uses of the containers referenced in the EN. It may carry a variety of items, none of which fall into any particular category that might preclude classification in heading 7326, HTSUSA. As should be appreciated, there is no single example provided for in EN 73.26 to which Customs may point as the perfect example of a container similar to the one subject to this reconsideration. Customs has, however, demonstrated that there are a significant number of common characteristics between the container in issue and the "boxes and cases" illustrated in Explanatory Note 73.26 to warrant classification in heading 7326, HTSUSA.

Although Customs has discussed the similarities between the relevant merchandise and the items identified in the Explanatory Notes to heading 7326, HTSUSA, it is important to remember that since heading 7326, HTSUSA, is a basket or residual provision it is only necessary to determine that Dorothy Thorpe/Christmas Corner's merchandise is not excluded from heading 7326, HTSUSA, nor specifically provided for elsewhere in the tariff schedule. Customs concludes that the merchandise is not precluded from classification in

heading 7326, HTSUSA, nor is it specifically provided for in another tariff schedule heading.

Continuing the classification of the traditional school lunch box shaped tin-plated container at the subheading level, the container is classified in subheading 7326.90.1000, HTSUSA. *See generally* NY H81764 (June 19, 2001), NY F81395 (Jan. 13, 2000) and NY B80840 (Jan. 10, 1997). Subheading 7326.90.1000, HTSUSA, provides for the classification of

7326	Other articles of iron or steel:
7326.90	Other:
7326.90.1000	Of tinplate.

The Customs Service specifically notes for the attention of the importer and the customs broker that Customs has not undertaken a laboratory analysis to confirm that the container in issue is tin-plated. Customs has relied on the statements of the customhouse broker indicating that the item is "made of tin" or "comprised mostly of tin." Should the container not prove to be tin-plated, this would significantly impact the classification and rate of duty of this merchandise and, additionally, bear negatively on the importer's obligation to use reasonable care in the classification, value and entry of its merchandise. *See* HQ 965063 (April 12, 2002) (a binding classification ruling classifying similar merchandise said to be tin-plated).

Should this container not be tin-plated, it would be classified in subheading 7326.90.8586, HTSUSA. Subheading 7326.90.8586, HTSUSA, provides for:

7326	Other articles of iron or steel:
7326.90	Other:
	Other:
	Other:
7326.90.85	Other,
7326.90.8586	Other.

Although not raised as an issue in the initial ruling request, substantially similar containers are frequently imported with edibles or other merchandise. Headquarters Ruling Letter 963670 addressed the classification of a container and other merchandise when imported together.

It is noted that Customs, in HQ 964234, initially classified this item in heading 4202, HTSUSA. Heading 4202, HTSUSA, provides for the classification of:

> Trunks, suitcases, vanity cases, attache cases, briefcases, school satchels, spectacle cases, binocular cases, camera cases, musical instrument cases, gun cases, holsters and similar containers; traveling bags, insulated food or beverage bags, toiletry bags, knapsacks and backpacks, handbags, shopping bags, wallets, purses, map cases, cigarette cases, tobacco pouches, tool bags, sports bags, bottle cases, jewelry boxes, powder cases, cutlery cases and similar containers, of leather or of composition leather, of sheeting of plastics, of textile materials, of vulcanized fiber, or of paperboard, or wholly of mainly covered with such materials or with paper.

Customs, during the course of this reconsideration, determined that the merchandise in issue was not similar to the items designated by name in the first part of heading 4202, HTSUSA, that aspect which precedes the semi-colon. It was also determined that consideration of the items listed in the second part of the heading was unnecessary because those articles must be made of specific materials and sheet steel, of which the "lunch tote" is believed to be composed, is not an enumerated material. Since Customs determined that the metal container imported by Dorothy Thorpe/Christmas Corner is not similar to the containers designated *eo nomine* in heading 4202, HTSUSA, Customs re-examined the headings of the HTSUSA and has concluded that the "lunch tote" is properly classified in heading 7326, HTSUSA.

Holding:

Headquarters Ruling Letter 964234 is hereby revoked.

The tin-plated container with a hinge and a handle in the shape of a school lunch box, only smaller, not designed to be used principally as sales packing nor designed as a table, kitchen or other household article, is classified in subheading 7326.90.1000, Harmonized Tariff Schedule of the United States Annotated.

The General Column 1 Rate of Duty is FREE.

This ruling, in accordance with 19 U.S.C. 1625 (c), will become effective sixty (60) days after its publication in the CUSTOMS BULLETIN.

JOHN ELKINS,
(for Myles B. Harmon, Acting Director,
Commercial Rulings Division.)

REVOCATION OF RULING LETTER AND REVOCATION OF TREATMENT RELATING TO THE TARIFF CLASSIFICATION OF BOWLING BALL CARRIER COMPONENTS OF MAN-MADE TEXTILE FIBERS IMPORTED WITHOUT BOTTOM PANELS

AGENCY: U.S. Customs Service; Department of the Treasury.

ACTION: Notice of revocation of tariff classification ruling letter and revocation of treatment relating to the classification of bowling ball carrier components of man-made textile fibers imported without bottom panels.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930, 19 U.S.C. 1625(c), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs is revoking one ruling relating to the tariff classification, under the Harmonized Tariff Schedule of the United States Annotated (HTSUSA), of bowling ball carrier components of man-made textile fibers imported without bottom panels. Customs is also revoking any treatment previously accorded by it to substantially identical merchandise.

Notice of the proposed action was published in the CUSTOMS BULLETIN, Volume 36, Number 24, on June 12, 2002. The Customs Service received no comments.

EFFECTIVE DATE: This action is effective for merchandise entered or withdrawn from warehouse for consumption on or after October 28, 2002.

FOR FURTHER INFORMATION CONTACT: J. Steven Jarreau, Textiles Classification Branch: (202) 572–8817.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On December 8, 1993, Title VI (Customs Modernization), of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057) (hereinafter "Title VI"), became effective. Title VI amended many sections of the Tariff Act of 1930, as amended, and related laws. Two new concepts which emerge from the law are **"informed compliance"** and **"shared responsibility."** These concepts

are premised on the idea that in order to maximize voluntary compliance with Customs laws and regulations, the trade community needs to be clearly and completely informed of its legal obligations. Accordingly, the law imposes a greater obligation on Customs to provide the public with improved information concerning the trade community's responsibilities and rights under the Customs and related laws. In addition, both the trade and Customs share responsibility in carrying out import requirements. For example, under section 484 of the Tariff Act of 1930, as amended, 19 U.S.C. 1484, the importer of record is responsible for using reasonable care to enter, classify and value imported merchandise, and provide any other information necessary to enable Customs to properly assess duties, collect accurate statistics and determine whether any other applicable legal requirement is met.

Pursuant to section 625(c)(1), Tariff Act of 1930, 19 U.S.C. 1625(c)(1), as amended by section 623 of Title VI, notice proposing to revoke New York Ruling Letter (NY) E81303 (May 18, 1999) was published in the CUSTOMS BULLETIN, Volume 36, Number 24, on June 12, 2002. No comments were received in response to the notice of proposed action. As was stated in the notice of proposed revocation, the notice covered any rulings which may have existed but which had not specifically been identified. Any party who has received an interpretive ruling or decision (*i.e.*, ruling letter, internal advice memorandum or decision or protest review decision) on the merchandise subject to this notice, which classified the merchandise contrary to this notice, should have advised Customs during this notice period.

Similarly, pursuant to section 625(c)(2), Tariff Act of 1930, 19 U.S.C. 1625(c)(2), as amended by section 623 of Title VI, Customs is revoking any treatment previously accorded by Customs to substantially identical merchandise. This treatment may, among other reasons, be the result of the importer's reliance on a ruling issued to a third party, Customs personnel applying a ruling of a third party to importation of the same or similar merchandise, or the importer's or Customs previous interpretation of the HTSUSA. Any person involved with substantially identical merchandise should have advised Customs during the comment period. An importer's failure to have advised Customs of substantially identical merchandise or of a specific ruling not identified in this notice, may raise issues of reasonable care on the part of the importers or their agents for importation of merchandise subsequent to the effective date of this notice.

The Customs Service in NY E81303 (May 18, 1999) classified what was described as unfinished bowling ball bags of man-made textile fibers imported without bottom panels, pursuant to General Rule of Interpretation 2(a), in subheadings 4202.92.3031 and 4202.92.2000, HTSUSA. It is now Customs position that the bowling ball carrier components of man-made textile fibers imported without bottom panels are properly classified, pursuant to General Rule of Interpretation 1, in subheading 6307.90.9889, HTSUSA.

Pursuant to 19 U.S.C. 1625(c)(1), Customs is revoking NY E81303 and any other ruling not specifically identified to reflect the proper classification of the merchandise pursuant to the analysis set forth in Headquarters Ruling Letter (HQ) 965448 (attached). Additionally, pursuant to 19 U.S.C. 1625(c)(2), Customs is revoking any treatment previously accorded by Customs to substantially identical merchandise.

This ruling will become effective, in accordance with 19 U.S.C. 1625(c), sixty (60) days after publication in the CUSTOMS BULLETIN.

Dated: August 8, 2002.

JOHN ELKINS,
(for Myles B. Harmon, Acting Director,
Commercial Rulings Division.)

[Attachment]

[ATTACHMENT]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, August 8, 2002.
CLA–2 RR:CR:TE 965448 jsj
Category: Classification
Tariff No. 6307.90.9889

MR. HERB LEVISON
PATRICK POWERS CUSTOMS BROKERS, INC.
Post Office Box 300155
JFK Airport
Jamaica, NY 11430

Re: Textile Bowling Ball Carrier Components Without Bottom Panels; Revocation of NY E81303; Subheading 6307.90.9889, HTSUSA; HQ 964717 (Jan. 28, 2002).

DEAR MR. LEVISON:

The purpose of this correspondence is to advise you that the Customs Service has reconsidered New York Ruling Letter (NY) E81303 (May 18, 1999) issued to you as the customhouse broker of Tai Wah USA, Inc.

New York Ruling Letter E81303 classified bowling ball carrier components of man-made textile material, imported without bottom panels, in subheadings 4202.92.3031 and 4202.92.2000, HTSUSA. We have reviewed that ruling and found it to be in error. This ruling revokes NY E81303.

Pursuant to section 625 (c), Tariff Act of 1930, as amended, 19 U.S.C. 1625(c), notice of the proposed revocation of NY E81303 was published on June 12, 2002, in the CUSTOMS BULLETIN, Volume 36, Number 24.

Facts:

The articles in issue are the textile components of three separate bowling ball carriers. The components of a large and a medium sized carrier are made of a textile fabric of one hundred (100) percent polyester, and those of a small carrier are composed of a fabric of fifty-five (55) percent ramie and forty-five (45) percent polyester. The components will be imported into the United States without bottom panels.

The Customs Service is advised that the country of manufacture of the textile components of the bowling ball carriers is China.

Issue:

What is the classification, pursuant to the Harmonized Tariff Schedule of the United States Annotated, of the above-described man-made textile components of the large, medium and small bowling ball carriers imported without bottom panels?

Law and Analysis:

The federal agency responsible for initially interpreting and applying the Harmonized Tariff Schedule of the United States Annotated (HTSUSA) is the U.S. Customs Service.[1] The Customs Service, in accordance with its legislative mandate, classifies imported merchandise pursuant to the General Rules of Interpretation (GRI) and the Additional U.S. Rules of Interpretation.[2]

General Rule of Interpretation 1 provides, in part, that classification decisions are to be "determined according to the terms of the headings and any relative section or chapter notes * * *." *General Rule of Interpretation 1*. General Rule of Interpretation 1 further states that merchandise which cannot be classified in accordance with the dictates of GRI 1 should be classified pursuant to the other General Rules of Interpretation, provided the HTSUSA chapter headings or notes do not require otherwise. According to the Explanatory Notes (EN), the phrase in GRI 1, "provided such headings or notes do not otherwise require," is intended to "make it quite clear that the terms of the headings and any relative Section or Chapter Notes are paramount * * *." *General Rules for the Interpretation of the Harmonized System, Rule 1, Explanatory Note (V).*

The Explanatory Notes constitute the official interpretation of the Harmonized System at the international level. *See* Joint Explanatory Statement *supra* note 1, at 549. The Explanatory Notes, although neither legally binding nor dispositive of classification issues, do provide commentary on the scope of each heading of the HTSUS. The EN are generally indicative of the proper interpretation of the headings. *See* T.D. 89–80, 54 Fed. Reg. 35127–28 (Aug. 23, 1989); *Lonza, Inc. v. United States*, 46 F. 3rd 1098, 1109 (Fed. Cir. 1995).

Commencing classification of the man-made textile components of the bowling ball carriers to be imported without bottom panels in accordance with the dictates of GRI 1, the Customs Service examined the headings of the HTSUSA. Customs review of the headings of the HTSUSA led it to heading 6307, HTSUSA. Heading 6307, HTSUSA, provides for "Other made up articles, including dress patterns." It is Customs determination that this heading most accurately describes the merchandise in issue. *See* HQ 964717 (Jan. 28, 2002).

Completing the classification of the man-made textile components of the bowling ball carrier components, the articles are classified in subheading 6307.90.9889, HTSUSA. Subheading 6307.90.9889, HTSUSA, provides for:

6307	Other made up articles, including dress patterns:
6307.90	Other:
	Other:
6307.90.98	Other:
	Other,
6307.90.9889	Other.

The Customs Service, prior to deciding that this classification question should be resolved pursuant to GRI 1, contemplated whether the merchandise in issue was an incomplete or unfinished article classified pursuant to GRI 2. General Rule of Interpretation 2 (a) provides that any reference in an HTSUSA heading to an article "shall be taken to include a reference to that article incomplete or unfinished * * *." GRI 2 (a) requires, however, that the incomplete or unfinished article have the "essential character" of the complete or finished article.

The issue Customs had to resolve was whether the articles imported by Tai Wah have the "essential character" of complete or finished products and whether they should, therefore, be classified pursuant to GRI 2(a) as if they were goods in their complete or finished state. The General Rules of Interpretation do not, however, define the phrase "essential character." Its meaning may be understood from an examination of the Explanatory Notes to GRI 2(a).

The EN to GRI 2 (a) draw a distinction between a "blank" which possesses the essential character of a finished article and a "semi-manufacture[d]" item that does not have the

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[1] *See* 19 U.S.C. 1500 (West 1999) (providing that the Customs Service is responsible for fixing the final appraisement, classification and amount of duty to be paid); *See also* Joint Explanatory Statement of the Committee of Conference, H.R. Conf. Rep. No. 100–576, at 549 (1988) *reprinted in* 1988 U.S. Code Cong. and Adm. News 1547, 1582 [hereinafter Joint Explanatory Statement].

[2] *See* 19 U.S. C. 1202 (West 1999); *See generally, What Every Member of The Trade Community Should Know About: Tariff Classification*, an Informed Compliance Publication of the Customs Service available on the World Wide Web site of the Customs Service at www.customs.gov, search "Importing & Exporting" and then "U.S. Customs Informed Compliance Publications."

essential character of a finished article. A "blank," as defined in the EN, is an article "not ready for direct use, having the approximate shape or outline of the finished article or part * * *." The EN continues stating that a "blank" is an article "which can only be used, other than in exceptional cases, for completion into the finished article or part * * *." A plastic bottle preform is offered in the EN as an example of a blank. Bottle preforms of plastic are "intermediate products having tubular shape, with one closed end and one open end threaded to secure a screw type closure, the portion below the threaded end being intended to be expanded to a desired size and shape."

"Semi-manufactures" are items that do not yet have the essential shape or character of the finished articles. Examples of semi-manufactures set forth in the EN are: "bars, discs, tubes, etc." Semi-manufactures are specifically not regarded as "blanks."

Completed bowling ball carriers are classified in heading 4202, HTSUSA. Heading 4202, HTSUSA, provides for the classification of:

> Trunks, suitcases, vanity cases, attache cases, briefcases, school satchels, spectacle cases, binocular cases, camera cases, musical instrument cases, gun cases, holsters and similar containers; traveling bags, insulated food or beverage bags, toiletry bags, knapsacks and backpacks, handbags, shopping bags, wallets, purses, map cases, cigarette cases, tobacco pouches, tool bags, **sports bags,** bottle cases, jewelry boxes, powder cases, cutlery cases and similar containers, of leather or of composition leather, of sheeting of plastics, of textile materials, of vulcanized fiber, or of paperboard, or wholly or mainly covered with such materials or with paper. [Emphasis added.].

Additional U.S. Note 1 to Chapter 42 allows Customs to infer a definition of the phrase "sports bags." The note states that the expression "*travel, sports and similar bags*" means "goods * * * of a kind designed for carrying clothing and other personal effects during travel, including backpacks and shopping bags of this heading, but does not include binocular cases, camera cases, musical instrument cases, bottle cases and similar containers." *Chapter 42, HTSUSA, Additional U.S. Note 1.*

An examination of the instant large, medium and small bowling ball carrier components, in the condition in which they are imported, reveals articles that do not yet have the essential character of complete or finished goods of a kind designed for carrying clothing and other personal effects during travel.

The Customs Service, following a line of reasoning employed for many years, concludes that the merchandise in issue lacks the essential character of "sports bags" of heading 4202, HTSUSA, because the goods cannot yet function as containers. The bowling ball carrier components, which do not have bottom panels, do not, in the condition in which they will be imported, have the capability of carrying clothing and other personal effects. *See* HQ 958915 (Feb. 27, 1996), HQ 959178 (June 24, 1996) and HQ 960883 (April 27, 1998). Since the textile components of the bowling ball carriers do not have the essential character of complete or finished "sports bags," they can not be classified pursuant to GRI 2(a) in heading 4202, HTSUSA.

Holding:

New York Ruling Letter E81303 (May 18, 1999) has been reconsidered and is hereby revoked.

The man-made textile components of the large, medium and small bowling ball carriers, imported without bottom panels, are classified in subheading 6307.90.9889, Harmonized Tariff Schedule of the United States Annotated.

The General Column 1 Rate of Duty is seven (7) percent, *ad valorem*.

This ruling, in accordance with 19 U.S.C. 1625 (c), will become effective sixty (60) days after its publication in the CUSTOMS BULLETIN.

JOHN ELKINS,
(for Myles B. Harmon, Acting Director,
Commercial Rulings Division.)

PROPOSED REVOCATION OF RULING LETTERS AND TREATMENT RELATING TO TARIFF CLASSIFICATION OF SPOONS

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of proposed revocation of ruling letters relating to the tariff classification of spoons.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. 1625(c)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs intends to revoke three ruling letters pertaining to the tariff classification of spoons and any treatment previously accorded by the Customs Service to substantially identical transactions. Comments are invited on the correctness of the intended action.

DATE: Comments must be received on or before September 27, 2002.

ADDRESS: Written comments (preferably in triplicate) are to be addressed to U.S. Customs Service, Office of Regulations and Rulings, Attention: General Classification Branch, 1300 Pennsylvnia Avenue, N.W., Washington, D.C. 20229. Comments submitted may be inspected at the U.S. Customs Service, 799 9th Street, N.W., Washington, D.C. during regular business hours. Arrangements to inspect submitted comments should be made in advance by calling Mr. Joseph Clark at (202) 572–8768.

FOR FURTHER INFORMATION CONTACT: Bill Conrad, Regulations Branch, (202) 572–8764.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On December 8, 1993, Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057) (hereinafter Title VI) became effective. Title VI amended many sections of the Tariff Act of 1930, as amended, and related laws. Two new concepts which emerge from the law are **"informed compliance"** and **"shared responsibility."** These concepts are premised on the idea that in order to maximize voluntary compliance with Customs laws and regulations, the trade community needs to be clearly and completely informed of its legal obligations. Accordingly, the law imposes a greater obligation on Customs to provide the public with improved information concerning the trade community's responsibilities and rights under the Customs and related laws. In addition, both the trade and Customs share responsibility in carrying out import requirements. For example, under section 484 of the Tariff Act of 1930, as amended (19 U.S.C. 1484), the importer of record is responsible for us-

ing reasonable care to enter, classify, and value imported merchandise, and to provide any other information necessary to enable Customs to properly assess duties, collect accurate statistics, and determine whether any other applicable legal requirement is met.

Pursuant to section 625(c)(1), Tariff Act of 1930, as amended (19 U.S.C. 1625(c)(1)) by section 623 of Title VI, this notice advises interested parties that Customs intends to revoke three ruling letters pertaining to the classification of spoons. Although in this notice, Customs is specifically referring to three New York Ruling Letters, NY D86420, NY E86257, and NY E88103, this notice covers any rulings on this merchandise which may exist but have not been specifically identified. Customs has undertaken reasonable efforts to search existing databases for rulings in addition to the three identified. No further rulings have been found. This notice will cover any rulings on this merchandise which may exist but have not been specifically identified. Any party who has received an interpretive ruling or decision (i.e., ruling letter, internal advice memorandum or decision, or protest review decision) on the merchandise subject of this notice should advise the Customs Service during this notice period.

Similarly, pursuant to section 625(c)(2), Tariff Act of 1930, as amended (19 U.S.C. 1625(c)(2)) by section 623 of Title VI, Customs intends to revoke any treatment previously accorded by the Customs Service to substantially identical transactions. This treatment may, among other reasons, be the result of the importer's reliance on a ruling letter issued to a third party, Customs personnel applying a ruling of a third party to importations of the same or similar merchandise, or the importer's or Customs previous interpretation of the Harmonized Tariff Schedule of the United States (HTSUS). Any person involved in substantially identical transactions should advise Customs during this notice period. An importer's failure to advise the Customs Service of substantially identical transactions, or of a specific ruling not identified in this notice, may raise issues of reasonable care on the part of the importer or its agents for importations of merchandise subsequent to this notice.

In NY D86420, dated January 7, 1999, and NY E86257, dated September 9, 1999, Customs classified certain spoons made of base metal with plastic or rubber handles in subheading 8215.99.4500, HTSUS, which provides for: Spoons, forks, ladles, skimmers, cake-servers, fish-knives, butter-knives, sugar tongs, and similar kitchen tableware; * * *: Other: Other: Spoons and ladles: Other. In NY E88103, dated December 20, 1999, Customs classified similar spoons in subheading 8215.99.5000, HTSUS, which provides for: Spoons, forks, ladles, skimmers, cake-servers, fish-knives, butter-knives, sugar tongs, and similar kitchen tableware; * * *: Other: Other: Other (including parts). Since their issuance, Customs has reconsidered the rulings and determined that the classification set forth in each is incorrect. It is now Customs position that all of the spoons are classifiable under subheading 8215.99.4060, HTSUS,

which provides for: Spoons, forks, ladles, skimmers, cake-servers, fish-knives, butter-knives, sugar tongs, and similar kitchen or tableware; * * *: Other: Other: Spoons and ladles: With base metal (except stainless steel) or nonmetal handles * * * Other.

Customs, pursuant to 19 U.S.C. 1625(c)(1), intends to revoke NY D86420, NY E86257, and NY E88103 (*see* Attachments A, B, and C to this document) and any other ruling not specifically identified to reflect the proper classification of the subject merchandise pursuant to the analysis set forth in Proposed Headquarters Ruling Letters (HQ) 965794 and (HQ) 965032 (*see* Attachments D and E to this document). Additionally, pursuant to 19 U.S.C. 1625(c)(2), Customs intends to revoke any treatment previously accorded by the Customs Service to substantially identical transactions. Before taking this action, consideration will be given to any written comments timely received.

Dated: August 13, 2002.

MARVIN AMERNICK,
(for Myles B. Harmon, Acting Director,
Commercial Rulings Division.)

[Attachments]

[ATTACHMENT A]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
New York, NY, January 7, 1999.

CLA–2–82:RR:NC:115 D86420
Category: Classification
Tariff No. 8215.99.4500

MR. ROBERT L. GARDENIER
M.E.DEY & CO.
5007 South Howell Avenue
P.O. Box 37165
Milwaukee, WI 53237–0165

Re: The tariff classification of spoons from the United Kingdom.

DEAR MR. GARDENIER:

In your letter dated December 29, 1998 you requested a tariff classification ruling on behalf of your client Smith & Nephew Inc. Rehab Div.

The samples submitted (style A703–205) is a Supergrip Bendable Utensil, (style A703–200) is a Supergrip Utensil, Teaspoon. The spoons are made of base metal with large rubber grip handles. The spoons are specially designed for people with physical disabilities or blindness.

The applicable subheading for the Supergrip spoons will be 8215.99.4500, Harmonized Tariff Schedule of the United States (HTS), which provides for Spoons, forks, ladles, skimmers, cake-servers, fish-knives, butter-knives, sugar tongs and similar kitchen or tableware; and base metal parts thereof: Other, Other, Spoons and Ladles, Other. The rate of duty will be free.

This ruling is being issued under the provisions of Part 177 of the Customs Regulations (19 C.F.R. 177).

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regarding the ruling, contact National Import Specialist Melvyn Birnbaum at 212–466–5487.

ROBERT B. SWIERUPSKI,
Director,
National Commodity Specialist Division.

[ATTACHMENT B]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
New York, NY, September 9, 1999.

CLA–2–82:RR:NC:1:115 E86257
Category: Classification
Tariff No. 8215.99.4500

MR. PHILIP KWOK
LIFETIME HOAN CORPORATION
One Merrick Avenue
Westbury, NY 11590–6601

Re: The tariff classification of Spoons from China.

DEAR MR. KWOK:

In your letter dated August 24, 1999 you requested a tariff classification ruling.

Two samples were submitted Item #83364 is a slotted spoon and Item #83715 is a basting spoon. Both spoons are made of stainless steel and both have handles made of solid plastic material with partial stainless steel covering both sides. Non-slip grips of Santoprene rubber are added to both sides.

The samples will be returned as per your request.

The applicable subheading for the Spoons will be 8215.99.4500, Harmonized Tariff Schedule of the United States (HTS), which provides for Spoons and ladles: Other. The rate of duty will be Free.

This ruling is being issued under the provisions of Part 177 of the Customs Regulations (19 C.F.R. 177).

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regarding the ruling, contact National Import Specialist Melvyn Birnbaum at 212–637–7017.

ROBERT B. SWIERUPSKI,
Director,
National Commodity Specialist Division.

[ATTACHMENT C]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
New York, NY, December 20, 1999.

CLA–2–82:RR:NC:1: 115 E88103
Category: Classification
Tariff No. 8215.99.4060

MR. PHILIP KWOK
LIFETIME HOAN CORPORATION
One Merrick Avenue
Westbury, NY 11590–6601

Re: The tariff classification of Spoons from China.

DEAR MR. KWOK:

As per your telephone call of October 6, 1999 you requested a tariff classification review of NY ruling E86257.

Two spoons were submitted Item #83364 is a slotted spoon and Item #83715 is a basting spoon. Both spoons are made of stainless steel and both have handles made of solid plastic material with partial stainless steel covering both sides. Non-slip grips of Santoprene rubber are added to both sides.

Both spoons were classified under subheading 8215.99.4500, HTS. Upon further review the classification for the Spoons of stainless steel with handles of solid plastic material will be 8215.99.5000.

The applicable subheading for the Spoons will be 8215.99.5000, Harmonized Tariff Schedule of the United States (HTS), which provides for Spoons, forks, ladles, skimmers, cake-servers, fish-knives, butter-knives, sugar tongs and similar kitchen or tableware, and base metal parts thereof: Other: Other(including parts.The rate of duty will be 5.3% ad valorem.

The samples will be returned as per your request.

In your telephone call of December 17, 1999 you inquired under what circumstances would the classification of the spoons fall under the subheading for stainless steel. If the handles are of stainless steel and valued under 25 cents each the subheading would be 8215.90.3000 and over 25 cents each the subheading would be 8215.35.0000. When the handles are a mixture of plastic and stainless steel the classification may have to be determined by value. E86257 is null and void and should not be used for entry purposes.

This ruling is being issued under the provisions of Part 177of the Customs Regulations (19 C.F.R. 177).

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regarding the ruling, contact National Import Specialist Melvyn Birnbaum at 212–637–7017.

ROBERT B. SWIERUPSKI,
Director,
National Commodity Specialist Division.

[ATTACHMENT D]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC.

CLA-2 RR:CR:GC 965794 bc
Category: Classification
Tariff No. 8215.99.4060

ROBERT L. GARDENIER
M.E. DEY & CO.
5007 South Howell Avenue
P.O. Box 37165
Milwaukee, WI 53237-0165

Re: Spoons; NY D86420 revoked.

DEAR MR. GARDENIER:

This concerns NY D86420, issued to you on January 7, 1999, on behalf of Smith & Nephew Inc. Rehab Div., by the Director, Customs National Commodity Specialist Division, New York, regarding the classification of certain spoons under the Harmonized Tariff Schedule of the United States (HTSUS).

As further explained below, in NY D86420, Customs classified the subject spoons under subheading 8215.99.4500, HTSUS, as spoons with handles made of something other than stainless steel, other base metals, or nonmetals. Customs has had the chance to review that ruling and finds it to be inconsistent with the HTSUS requirements for classification of such merchandise. It is now Customs position that the spoons at issue are properly classifiable under subheading 8215.99.4060, HTSUS, as spoons with nonmetal handles. For the reasons stated below, this ruling revokes NY D86420.

Facts:

In NY D86420, Customs described the spoons as made of base metal with large rubber grip handles, specially designed for people with physical disabilities or blindness. The samples submitted were for two styles: Style A703-205, the "Supergrip Bendable Utensil" and Style A703-200, the "Supergrip Utensil, Teaspoon." Based on this description, Customs classified the spoons under subheading 8215.99.4500, HTSUS, which provides for: Spoons, forks, ladles, skimmers, cake-servers, fish-knives, butter-knives, sugar tongs, and similar kitchen or tableware; and base metal parts thereof: Other: Other: Spoons and ladles: Other.

Issue:

Whether the spoons are classifiable under subheading 8215.99.4500, HTSUS, or subheading 8215.99.4060, HTSUS?

Law and Analysis:

Classification of goods under the HTSUS is made in accordance with the General Rules of Interpretation ("GRIs"). GRI 1 provides that classification of goods shall be determined according to the terms of the headings of the tariff schedule and any relevant Section or Chapter notes. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRIs may then be applied.

The Harmonized Commodity Description and Coding System Explanatory Notes (ENs) constitute the official interpretation of the Harmonized System at the international level. The ENs, neither legally binding nor dispositive, provide a commentary on the scope of each heading of the HTSUS and are generally indicative of their proper interpretation. See Treasury Decision 89-80.

The relevant HTSUS provisions under consideration are as follows:

8215	Spoons, forks, ladles, skimmers, cake-servers, fish-knives, butter-knives, sugar tongs, and similar kitchen or tableware; and base metal parts thereof:
* * * * * * *	
8215.99	Other:
* * * * * * *	

	Spoons and ladles:
	With stainless steel handles:
8215.99.30	Spoons valued under 25 cents each
8215.99.35	Other
8215.99.40	With base metal (except stainless steel) or nonmetal handles
8215.99.45	Other
8215.99.50	Other (including parts)

Spoons (not plated with precious metal) are classifiable at the eight-digit level according to the composition of the handles. (Individual spoons, forks, etc., that are plated with precious metal are classifiable under subheading 8215.91, HTSUS.) Spoons with stainless steel handles are classifiable, depending on their value, under subheadings 8215.99.30 and 8215.99.35, HTSUS. Spoons with handles of base metal (except stainless steel) or nonmetal are classifiable under subheading 8215.99.40, HTSUS. Spoons with handles consisting of something other than stainless steel, other base metals, or non-metal, such as precious metal, are classifiable in subheading 8215.99.45, HTSUS. As the spoons at issue have rubber handles and rubber is a nonmetal, they are not classifiable at the eight-digit level as spoons with handles of other than stainless steel, other base metals, or nonmetal in subheading 8215.99.45, HTSUS. Instead, they are classifiable as spoons with nonmetal handles (of rubber) in subheading 8215.99.40, HTSUS.

Holding:

The base metal spoons with rubber handles are classifiable as spoons, other than tablespoons, with nonmetal handles in subheading 8215.99.4060, HTSUS.

Effect on Other Rulings:

NY D86420 is revoked.

MYLES B. HARMON,
Acting Director,
Commercial Rulings Division.

[ATTACHMENT E]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC.

CLA–2 RR:CR:GC 965032 bc
Category: Classification
Tariff No. 8215.99.4060

PHILIP KWOK
LIFETIME HOAN CORPORATION
One Merrick Avenue
Westbury, NY 11590–6601

Re: Spoons; NY E86257 and NY E88103 revoked.

DEAR MR. KWOK:

This concerns NY E86257, dated September 9, 1999, and NY E88103, dated December 20, 1999, both issued to you by the Director, Customs National Commodity Specialist Division, New York, regarding the classification of certain spoons under the Harmonized Tariff Schedule of the United States (HTSUS).

In NY E86257, Customs classified two types of spoons under subheading 8215.99.4500, HTSUS. In NY E88103, Customs reclassified the same spoons under subheading 8215.99.5000, HTSUS. The latter ruling was issued as a reconsideration of the former ruling. (Customs notes a typographical error in NY E88103 that shows subheading 8215.99.4060, HTSUS, in the "Tariff No." line of the header.) Customs has had the chance to review these rulings and finds them to be inconsistent with the HTSUS requirements

for classification of such merchandise. It is now Customs position that the spoons at issue are properly classifiable under subheading 8215.99.4060, HTSUS. For the reasons stated below, this ruling revokes NY E86257 and NY E88103.

Facts:

In NY E86257 and NY E88103, Customs described the two types of spoons there classified as a slotted spoon (Item #83364) and a basting spoon (Item #83715), both made of stainless steel with plastic handles. The handles also have stainless steel sides and rubber non-slip grips (attached to the sides of the handle). In NY E86257, Customs classified both spoons in subheading 8215.99.4500, HTSUS, as: Spoons, forks, ladles, skimmers, cake-servers, fish-knives, butter-knives, sugar tongs, and similar kitchen or tableware; and base metal parts thereof: Other: Other: Spoons and ladles: Other. In NY E88103, Customs reclassified both spoons in subheading 8215.99.5000, HTSUS, as: Spoons, forks, ladles, skimmers, cake-servers, fish-knives, butter-knives, sugar tongs, and similar kitchen or tableware; and base metal parts thereof: Other: Other: Other (including parts).

Customs, as explained below, now believes that the spoons are classifiable under subheading 8215.99.4060, HTSUS, as spoons (not plated with precious metal), other than tablespoons, with nonmetal handles. (Individual spoons, forks, etc, that are plated with precious metal are classifiable under subheading 8215.91, HTSUS.)

Issue:

Whether the spoons are classifiable under subheading 8215.99.3000, 8215.99.3500, 8215.99.4060, 8215.99.4500, HTSUS, or 8215.99.5000, HTSUS?

Law and Analysis:

Classification of goods under the HTSUS is made in accordance with the General Rules of Interpretation ("GRIs"). GRI 1 provides that classification of goods shall be determined according to the terms of the headings of the tariff schedule and any relevant Section or Chapter notes. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRIs may then be applied.

The Harmonized Commodity Description and Coding System Explanatory Notes (ENs) constitute the official interpretation of the Harmonized System at the international level. While neither legally binding nor dispositive, the ENs provide a commentary on the scope of each heading of the HTSUS and are generally indicative of the proper interpretation of these headings. See Treasury Decision 89–80.

The relevant HTSUS provisions under consideration are as follows:

8215	Spoons, forks, ladles, skimmers, cake-servers, fish-knives, butter-knives, sugar tongs, and similar kitchen or tableware; and base metal parts thereof:
* * * * * * *	
8215.99	Other:
* * * * * * *	
	Spoons and ladles:
	With stainless steel handles:
8215.99.30	Spoons valued under 25 cents each
8215.99.35	Other
8215.99.40	With base metal (except stainless steel) or nonmetal handles
8215.99.45	Other
8215.99.50	Other (including parts)

Initially, classification in subheading 8215.99.5000, HTSUS, is readily disposed of by recognition of the fact that the spoons at issue are classifiable only under a subheading that provides for spoons, i.e., at the eight-digit level, 8215.99.30, 8215.99.35, 8215.99.40, or 8215.99.45, HTSUS. An article classified in subheading 8215.99.5000, HTSUS, must be something other than a spoon or a ladle, such as a butter-knife, sugar tong, or similar kitchen or tableware. Thus, we conclude that the spoons are not classifiable in subheading 8215.99.5000, HTSUS.

Determining which of the remaining subheadings provides for the classification of the spoons requires an examination of the composition of the spoon handles. Spoons with han-

dles of stainless steel are classifiable, depending on their value, in subheadings 8215.99.30 or 8215.99.35, HTSUS. Spoons with handles of base metal (except stainless steel) or nonmetal are classifiable under subheading 8215.99.40, HTSUS. Spoons with handles consisting of something other than stainless steel, other base metals, or nonmetal, such as precious metal, are classifiable in subheading 8215.99.45, HTSUS. As the handles of the spoons consist of plastic, stainless steel, and rubber, application of GRI 3, applicable at the subheading level through application of GRI 6, is called for.

Before applying GRI 3, classification of the spoons under subheading 8215.99.30, HTSUS, can be disposed of without further consideration. The subheading provides for spoons with stainless steel handles valued under 25 cents each, and the spoons at issue are valued in excess of 25 cents each. This fact eliminates the subheading as a classification possibility and leaves subheading 8215.99.35, HTSUS, as the only possibility for classifying the spoons as spoons with stainless steel handles. Also, classification in subheading 8215.99.4500, HTSUS, can be disposed of without further consideration by recognition of the fact that this subheading provides for classification of spoons with handles made of materials other than stainless steel, other base metals, or nonmetals. As the handles of the spoons at issue consist of plastic (nonmetal), stainless steel, and rubber (nonmetal), the spoons cannot be classified in subheading 8215.99.4500, HTSUS. This leaves only subheadings 8215.99.35 and 8215.99.40, HTSUS, as classification possibilites.

Under GRI 3(a), in pertinent part, and GRI 6, classification is appropriate in the subheading that provides the most specific description of the article or component under consideration. In this case, the description referred to is the composition of the spoon handles which determines classification of the spoons at the eight-digit level. However, when two or more subheadings each refer to part only of the materials or substances contained in mixed or composite goods, those subheadings are to be regarded as equally specific, and consideration of the article or component for classification purposes will proceed under GRI 3(b). As subheading 8215.99.35, HTSUS, refers to stainless steel handles and subheading 8215.99.40, HTSUS, refers to handles of base metal (except stainless steel) and nonmetal (here, the plastic and rubber), these subheadings are regarded as equally specific, and classification of the spoons will be considered under GRI 3(b).

Under GRI 3(b), as applied to the facts of this case, classification is determined by ascertaining which of the materials of the spoon handles, the plastic, stainless steel, or rubber, imparts to the spoon handle its essential character. Classification in subheading 8215.99.35, HTSUS, will follow if the essential character of the handles is imparted by the stainless steel component. Classification in subheading 8215.99.40, HTSUS, will follow if the essential character of the handles is imparted by the plastic or the rubber component.

Based on the description of the spoons provided by Lifetime Hoan Corporation, we find that the plastic and rubber materials are the primary materials of the spoon handles, as the plastic represents the essentail form and substance of the handle and the rubber provides the important non-slip gripping feature. Thus, we conclude that the essential character of the handles is not imparted by the stainless steel component. As between the plastic and rubber components of the handles, both nonmetal materials, we submit that an essential character determination is not necessary, since classification will be the same under subheading 8215.99.40, HTSUS, regardless of which of these two components is said to impart essential character.

Holding:

Based on the foregoing, the spoons with handles of plastic, rubber, and stainless steel are classifiable as spoons, other than tablespoons, with nonmetal handles in subheading 8215.99.4060, HTSUS.

Effect on Other Rulings:

NY E86257 and NY E88103 are revoked.

MYLES B. HARMON,
Acting Director,
Commercial Rulings Division.

REVOCATION OF RULING LETTER AND TREATMENT RELATING TO TARIFF CLASSIFICATION OF SNAP-OFF BLADES

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of revocation of a ruling letter and treatment relating to the tariff classification of snap-off blades for a utility knife.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. 1625(c)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs is revoking a ruling letter pertaining to the tariff classification, under the Harmonized Tariff Schedule of the United States (HTSUS), of snap-off blades for a utility knife and revoking any treatment previously accorded by the Customs Service to substantially identical transactions. Notice of the proposed action was published in the CUSTOMS BULLETIN on July 10, 2002. No comments were received in response to this notice.

EFFECTIVE DATE: This revocation is effective for merchandise entered or withdrawn from warehouse for consumption on or after October 28, 2002.

FOR FURTHER INFORMATION CONTACT: Keith Rudich, Commercial Rulings Division, (202) 572–8782.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On December 8, 1993, Title VI, (Customs Modernization), of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057) (hereinafter "Title VI"), became effective. Title VI amended many sections of the Tariff Act of 1930, as amended, and related laws. Two new concepts which emerge from the law are **"informed compliance"** and **"shared responsibility."** These concepts are premised on the idea that in order to maximize voluntary compliance with Customs laws and regulations, the trade community needs to be clearly and completely informed of its legal obligations. Accordingly, the law imposes a greater obligation on Customs to provide the public with improved information concerning the trade community's responsibilities and rights under the Customs and related laws. In addition, both the trade and Customs share responsibility in carrying out import requirements. For example, under section 484 of the Tariff Act of 1930, as amended, (19 U.S.C. §1484) the importer of record is responsible for using reasonable care to enter, classify and value imported merchandise, and provide any other information necessary to enable Customs to properly assess duties, collect accurate statistics and determine whether any other applicable legal requirement is met.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI, a notice was published on July 10, 2002, in the CUSTOMS BULLETIN, Vol. 36, No. 28, proposing to revoke ruling letter NY E89191, dated October 27, 1999, and revoke the tariff classification of snap-off blades used in utility knives. No comments were received in response to this notice.

As stated in the proposed notice, this revocation will cover any rulings on this merchandise which may exist but have not been specifically identified. Any party who has received an interpretive ruling or decision (i.e., ruling letter, internal advice memorandum or decision or protest review decision) on the merchandise subject to this notice, should have advised Customs during the comment period.

Similarly, pursuant to section 625(c)(2), Tariff Act of 1930 (19 U.S.C. 1625(c)(2)), as amended by section 623 of Title VI, Customs intends to revoke any treatment previously accorded by the Customs Service to substantially identical transactions. This treatment may, among other reasons, be the result of the importer's reliance on a ruling issued to a third party, Customs personnel applying a ruling of a third party to importations of the same or similar merchandise, or the importer's or Customs previous interpretation of the Harmonized Tariff Schedule of the United States (HTSUS). Any person involved in substantially identical transactions should have advised Customs during this notice period. An importer's failure to have advised the Customs Service of substantially identical transactions or of a specific ruling not identified in this notice, may raise issues of reasonable care on the part of the importer or their agents for importations of merchandise subsequent to the effective date of this final notice.

In NY E89191, dated October 27, 1999, Customs found that snap-off blades, sample numbers 11–300 and 11–301, used in standard utility knives were classified in subheading 8211.94.10, HTSUS, as blades, for knives having fixed blades. Customs has reviewed the matter and determined that the correct classification of the snap-off blades for utility knives is in subheading 8211.94.50, HTSUS, which provides for other blades.

Pursuant to 19 U.S.C. 1625(c)(1), Customs is revoking NY E89191 and any other ruling not specifically identified to reflect the proper classification of the merchandise pursuant to the analysis set forth in Headquarters Ruling Letter (HQ) 964995. Additionally, pursuant to 19 U.S.C. 1625(c)(2), Customs is revoking any treatment previously accorded by the Customs Service to substantially identical transactions. HQ 964995, revoking NY E89191, is set forth as the "Attachment" to this document.

In accordance with 19 U.S.C. 1625(c), this ruling will become effective 60 days after publication in the CUSTOMS BULLETIN.

Dated: August 13, 2002.

MARVIN AMERNICK,
(for Myles B. Harmon, Acting Director,
Commercial Rulings Division.)

[Attachment]

[ATTACHMENT]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, August 13, 2002.

CLA–2 RR:CR:GC 964995 KBR
Category: Classification
Tariff No. 8211.94.50

MS. SARAH M. NAPPI
ABLONDI, FOSTER, SOBIN & DAVIDOW
1150 Eighteenth St., N.W.
Washington, DC 20036–4129

Re: Reconsideration of NY E89191; Snap-Off Blades for Utility Knives.

DEAR MS. NAPPI:

This is in reference to New York Ruling Letter (NY) E89191, issued to you on behalf of your client, The Stanley Works, by the Customs National Commodity Specialist Division, on October 27, 1999, concerning the classification, under the Harmonized Tariff Schedule of the United States (HTSUS), of snap-off blades for utility knives. We have reviewed the prior ruling and have determined that the classification provided is incorrect.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), a notice was published on July 10, 2002, in Vol. 36, No. 28 of the CUSTOMS BULLETIN, proposing to revoke NY E89191. No comments were received in response to this notice. This ruling revokes NY E89191 by providing the correct classification for the snap-off blades for utility knives.

Facts:

NY E89191 concerns snap-off blades for standard utility knives. The blades are scored such that when the outermost blade becomes dull, the user simply snaps off the dull blade to expose a new, sharp blade point.

In NY E89191, it was determined that the snap-off utility blades were blades for knives having fixed blades, classifiable under subheading 8211.92.20, HTSUS. We have reviewed that ruling and determined that the classification of the snap-off blades is incorrect. This ruling sets forth the correct classification.

Issue:

What is the classification under the HTSUS of snap-off blades for utility knives?

Law and Analysis:

Merchandise is classifiable under the Harmonized Tariff Schedule of the United States (HTSUS) in accordance with the General Rules of Interpretation (GRIs). The systematic detail of the HTSUS is such that virtually all goods are classified by application of GRI 1, that is, according to the terms of the headings of the tariff schedule and any relative Section or Chapter Notes. In the event that the goods cannot be classified solely on the basis of

GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRIs may then be applied.

The HTSUS provisions under consideration are as follows:

8211	Knives with cutting blades, serrated or not (including pruning knives), other than knives of heading 8208, and blades and other base metal parts thereof:
	Other:
8211.94	Blades:
8211.94.10	For knives having fixed blades
8211.94.50	Other

The snap-off blades are for use in a standard utility knife. Customs has consistently classified these utility knives as knives having other than fixed blades, in subheading 8211.93, HTSUS. *See, e.g.*, NY C83527 (February 6, 1998); NY H80237 (May 3, 2001); NY H87038 (January 16, 2002); HQ 084074 (July 3, 1989); HQ 952988 February 4, 1993). Since the knives are classified as knives having *other than* fixed blades, the blades used in the knives should not be classified as blades for knives *with* fixed blades. Customs has ruled that snap-off blades for utility knives should be classified not as for knives having fixed blades, but in the "other" provision. *See* NY 808354 (April 13, 1995) and NY B88290 (August 22, 1997). We agree with this classification. Therefore, snap-off blades for use in standard utility knives are classified in subheading 8211.94.50, HTSUS, as blades, other.

Holding:

Snap-off blades for use in standard utility knives are classified in subheading 8211.94.50, HTSUS, as blades, other.

Effect on Other Rulings:

NY E89191 dated October 27, 1999, is REVOKED. In accordance with 19 U.S.C. § 1625(c), this ruling will become effective sixty (60) days after its publication in the CUSTOMS BULLETIN.

MARVIN AMERNICK,
(for Myles B. Harmon, Acting Director,
Commercial Rulings Division.)

REVOCATION OF RULING LETTER AND REVOCATION OF TREATMENT RELATING TO TARIFF CLASSIFICATION OF CURRENT SENSORS

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of revocation of ruling letter and treatment relating to tariff classification of current sensors.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. 1625(c)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub.L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs is revoking a ruling letter pertaining to the tariff classification of current sensors under the Harmonized Tariff Schedule of the United States ("HTSUS"). Similarly, Customs is revoking any treatment previously accorded by Customs to substantially identical transactions. Notice of the proposed revocation was published on July 10, 2002, in the CUSTOMS BULLETIN. No comments were received in response to this notice.

EFFECTIVE DATE: This action is effective for merchandise entered or withdrawn from warehouse for consumption on or after October 28, 2002.

FOR FURTHER INFORMATION CONTACT: Tom Peter Beris, General Classification Branch, at (202) 572–8789.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On December 8, 1993, Title VI, (Customs Modernization), of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), (hereinafter "Title VI"), became effective. Title VI amended many sections of the Tariff Act of 1930, as amended, and related laws. Two new concepts which emerge from the law are **"informed compliance"** and **"shared responsibility."** These concepts are premised on the idea that in order to maximize voluntary compliance with Customs laws and regulations, the trade community needs to be clearly and completely informed of its legal obligations. Accordingly, the law imposes a greater obligation on Customs to provide the public with improved information concerning the trade community's responsibilities and rights under the Customs and related laws. In addition, both the trade and Customs share responsibility in carrying out import requirements. For example, under section 484 of the Tariff Act of 1930, as amended (19 U.S.C. 1484), the importer of record is responsible for using reasonable care to enter, classify and value imported merchandise, and provide any other information necessary to enable Customs to properly assess duties, collect accurate statistics and determine whether any other applicable legal requirement is met.

Pursuant to Customs obligations, a notice was published on July 10, 2002, in Vol. 36, No. 28 of the CUSTOMS BULLETIN, proposing to revoke a ruling letter pertaining to the tariff classification of current sensors. No comments were received in response to this notice.

As stated in the proposed notice, this revocation will cover any rulings on this merchandise which may exist but have not been specifically identified. Any party who has received an interpretive ruling or decision (i.e., ruling letter, internal advice memorandum or decision, or protest review decision) on the merchandise subject to this notice should have advised Customs during the comment period. Similarly, pursuant to section 625(c)(2), Tariff Act of 1930, as amended (19 U.S.C. 1625(c)(2)), Customs is revoking any treatment previously accorded by Customs to substantially identical transactions. This treatment may, among other reasons, be the result of the importer's reliance on a ruling issued to a third party, Customs personnel applying a ruling of a third party to importations of the same or similar merchandise, or the importer's or Customs previous interpretation of the Harmonized Tariff Schedule of the United States. Any person involved in substantially identical transactions should have advised Customs during this notice period. An importer's reliance on a treatment of substantially identical transactions or on

a specific ruling concerning the merchandise covered by this notice may raise the rebuttable presumption of lack of reasonable care on the part of the importer or its agents for importations subsequent to the effective date of this final decision.

Pursuant to 19 U.S.C. 1625(c)(1), Customs is revoking NY 815901 to the extent that it does not reflect the proper classification of the current sensor pursuant to the analysis in HQ 965698, which is set forth as the Attachment to this document. Additionally, pursuant to 19 U.S.C. 1625(c)(2), Customs is revoking any treatment previously accorded by the Customs Service to substantially identical transactions.

In accordance with 19 U.S.C. 1625(c), this ruling will become effective 60 days after publication in the CUSTOMS BULLETIN.

Dated: August 13, 2002.

MARVIN AMERNICK,
(for Myles B. Harmon, Acting Director,
Commercial Rulings Division.)

[Attachment]

[ATTACHMENT]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, August 13, 2002.

CLA–2 RR: CR: GC 965698 TPB
Category: Classification
Tariff No. 9030.39.00

MR. DALE FOLGATE
HONEYWELL MICROSWITCH
HONEYWELL, INC.
11 West Spring Street
Freeport, IL 61032–4353

Re: Current sensor; NY 815901 Revoked.

DEAR MR. FOLGATE:

This concerns NY 815901, dated November 21, 1995, issued to you by the Director, Customs National Commodity Specialist Division, New York, regarding the classification of a closed-loop linear current sensor, under the Harmonized Tariff Schedule of the United States ("HTSUS").

In NY 815901, Customs classified the current sensor under subheading 8542.19.0090, HTSUS, which provides for electronic integrated circuits and microassemblies; monolithic integrated circuits: other: other: other, including mixed signals (analog/digital): other. We have had an opportunity to review that ruling and find it to be inconsistent with the HTSUS requirements for classification of such merchandise. It is now Customs position that the current sensor is properly classified under subheading 9030.39.00, HTSUS, which provides for oscilloscopes, spectrum analyzers and other instruments and apparatus for measuring or checking electrical quantities, excluding meters of heading 9028; instruments and apparatus for measuring or detecting alpha, beta, gamma, X-ray, cosmic or other ionizing radiations; parts and accessories thereof: Other instruments and apparatus, for measuring or checking voltage, current, resistance or power, without a recording device: other. For the reasons stated below, this ruling revokes NY 815901.

Pursuant to 625 (c), Tariff Act of 1930 (19 U.S.C. 1625 (c)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act, Pub. L. 103–182, 107 Stat. 2057, 2186 (1993), notice of the proposed revocation of NY 815901 was published on July 10, 2002, in the CUSTOMS BULLETIN, Volume 36, Number 28. No comments were received in response to that notice.

Facts:

In NY 815901, the current sensor is described as follows:

> The merchandise is described as a closed-loop linear current sensor. A current sensor is an electronic device that detects or measures the amount of AC or DC current flowing through a wire and provides a digital or analog output. Sensors are used for ground fault detection, control feedback loops, motor overload detection and energy management. Closed-loop current sensors are made up of a magnetic core, a secondary coil winding around the core, an analog output Hall effect integrated circuit ("IC"), an operational amplifier and supporting electronics in a plastic housing.
>
> A wire carrying the to be measured current (primary) is placed through the core of the sensor. The current in the primary generates a magnetic flux field around the wire. The flux is concentrated on the Hall effect IC by the magnetic core. The Hall effect IC generates a voltage proportional to the strength of the magnetic field. The operational amplifier creates a current that is passed through the secondary winding to produce a magnetic field with the opposite polarity to the field created by the primary current. Sensors work by the null balance principle which is always driving the total magnetic flux in the core to zero. The current in the secondary winding is therefore a mirror image of the primary current reduced by the number of wire turns in the secondary winding. Passing the secondary current through a precision measuring resistor gives a voltage drop proportional to the current in the primary circuit.

Issue:

Is the current sensor properly classified under heading 8542, which provides for electronic integrated circuits and microassemblies; and parts thereof * * *; or under heading 9030, which provides for other instruments and apparatus for measuring or checking electrical quantities?

Law and Analysis:

Classification under the HTSUS is made in accordance with the General Rules of Interpretation ("GRIs"). GRI 1 provides that the classification of goods shall be determined according to the terms of the headings of the tariff schedule and any relative Section or Chapter Notes. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRIs may then be applied.

The Harmonized Commodity Description and Coding System Explanatory Notes ("ENs") constitute the official interpretation of the Harmonized System at the international level. While neither legally binding nor dispositive, the ENs provide a commentary on the scope of each heading of the HTSUS and are generally indicative of the proper interpretation of these headings. See T.D. 89–80.

The HTSUS provisions under consideration are as follows:

8542	Electronic integrated circuits and microassemblies; parts thereof:
9030	Oscilloscopes, spectrum analyzers and other instruments and apparatus for measuring or checking electrical quantities, excluding meters of heading 9028; instruments and apparatus for measuring or detecting alpha, beta, gamma, X-ray, cosmic or other ionizing radiations; parts and accessories thereof:

In its condition as imported, the current sensor is a finished device that measures the amount of AC or DC current flowing through a wire and provides a digital or analog output. Clearly, this merchandise is not a mere integrated circuit. Indeed, the IC is only one part of a complete and finished current sensing device. GRI 1 states, in pertinent part, that "for legal purposes, classification shall be determined according to the terms of the headings and any relative section or chapter notes * * *"

In applying the principals of GRI 1, we find that the terms of heading 9030, HTSUS, provide for the current sensor in its entirety.

Therefore, through application of GRI 1, by the terms of the heading and through application of the relevant Section Notes, the current sensor is classifiable under heading

9030, HTSUS, which provides for other instruments and apparatus for measuring or checking electrical quantities.

Holding:

For the reasons stated above the current sensor is classified under subheading 9030.39.00, HTSUS, as: "Oscilloscopes, spectrum analyzers and other instruments and apparatus for measuring or checking electrical quantities, excluding meters of heading 9028; instruments and apparatus for measuring or detecting alpha, beta, gamma, X-ray, cosmic or other ionizing radiations; parts and accessories thereof: Other instruments and apparatus, for measuring or checking voltage, current, resistance or power, without a recording device: other."

Effect on Other Rulings:

NY 815901 is revoked.

MARVIN AMERNICK,
(for Myles B. Harmon, Acting Director,
Commercial Rulings Division.)

REVOCATION OF RULING LETTER AND TREATMENT RELATING TO TARIFF CLASSIFICATION OF A TEMPORARY TATTOO SET

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of revocation of a ruling letter and treatment relating to tariff classification of a temporary tattoo set.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930, as amended, (19 U.S.C. 1625(c)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs is revoking one ruling letter pertaining to the tariff classification of a temporary tattoo set under the Harmonized Tariff Schedule of the United States ("HTSUS"). Similarly, Customs is revoking any treatment previously accorded by Customs to substantially identical transactions. Notice of the proposed revocation was published on July 10, 2002, in the CUSTOMS BULLETIN. No comments were received in response to this notice.

EFFECTIVE DATE: This revocation is effective for merchandise entered or withdrawn from warehouse for consumption on or after October 28, 2002.

FOR FURTHER INFORMATION CONTACT: Deborah Stern, General Classification Branch (202) 572–8785.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On December 8, 1993, Title VI, (Customs Modernization), of the North American Free Trade Agreement Implementation Act (Pub. L.

103–182, 107 Stat. 2057), (hereinafter "Title VI"), became effective. Title VI amended many sections of the Tariff Act of 1930, as amended, and related laws. Two new concepts which emerge from the law are **informed compliance** and **shared responsibility.** These concepts are premised on the idea that in order to maximize voluntary compliance with Customs laws and regulations, the trade community needs to be clearly and completely informed of its legal obligations. Accordingly, the law imposes a greater obligation on Customs to provide the public with improved information concerning the trade community's responsibilities and rights under the Customs and related laws. In addition, both the trade and Customs share responsibility in carrying out import requirements. For example, under section 484 of the Tariff Act of 1930, as amended (19 U.S.C. 1484), the importer of record is responsible for using reasonable care to enter, classify and value imported merchandise, and provide any other information necessary to enable Customs to properly assess duties, collect accurate statistics and determine whether any other applicable legal requirement is met.

Pursuant to section 625(c)(1), Tariff Act of 1930, as amended (19 U.S.C. 1625(c)(1)), a notice was published on July 10, 2002, in the CUSTOMS BULLETIN, Volume 36, Number 28, proposing to revoke HQ 959232, dated June 2, 1998, which classified a temporary tattoo set in subheading 9503.70.00, Harmonized Tariff Schedule of the United States (HTSUS), as other toys put up in sets or outfits. No comments were received in response to this notice.

As stated in the proposed notice, this revocation will cover any rulings on this merchandise which may exist but have not been specifically identified. Customs has undertaken reasonable efforts to search existing databases for rulings in addition to the one identified. Any party who has received an interpretive ruling or decision (i.e., ruling letter, internal advice memorandum or decision or protest review decision) on the merchandise subject to this notice should have advised Customs during the comment period.

Similarly, pursuant to section 625(c)(2), Tariff Act of 1930, as amended (19 U.S.C. 1625(c)(2)), Customs is revoking any treatment previously accorded by Customs to substantially identical transactions. This treatment may, among other reasons, be the result of the importer's reliance on a ruling issued to a third party, Customs personnel applying a ruling of a third party to importations of the same or similar merchandise, or to the importer's or Customs' previous interpretation of the Harmonized Tariff Schedule of the United States. Any person involved in substantially identical transactions should have advised Customs during this notice period. An importer's reliance on treatment of a substantially identical transactions or on a specific ruling concerning the merchandise covered by this notice which was not identified in this notice may raise the rebuttable presumption of lack of reasonable care on the part of the importer or its agents for importations subsequent to the effective date of this final decision.

In HQ 959232, dated June 2, 1998, Customs classified a temporary tattoo set consisting of six sheets of tattoo designs, four non-toxic, colored markers, thirty sheets of blank tattoo paper, one plastic water applicator bottle, and a sheet of instructions, all of which are imported in a decorative cardboard box as a toy set of heading 9503.70.00, HTSUS, which provides for "Other toys; reduced-size ("scale") models and similar recreational models, working or not; puzzles of all kinds; parts and accessories thereof: other toys, put up in sets or outfits, and parts and accessories thereof." The set is intended for children to apply the temporary tattoos after moistening the skin, pressing the paper to the skin, applying pressure, and peeling back to reveal the design. The set is also intended for children to trace and color designs onto tattoo paper, or make their own designs and apply the temporary tattoos they have created to their skin.

According to the Subheading Explanatory Note, a toy set of subheading 9503.70.00, HTSUS, is subject to substantiated classification in heading 9503. Transfers (decalcomanias), which are provided for *eo nomine* in heading 4908, HTSUS, are excluded from heading 9503 by the Explanatory Notes (ENs). These temporary tattoos are transfers (decalcomanias), and are thus excluded. As the tattoos cannot be classified as a toy of heading 9503, HTSUS, the set cannot be classified as a toy set of subheading 9503.70.00, HTSUS.

Moreover, the ENs suggest that activities such as coloring, drawing, tracing, are excluded from classification in heading 9503, HTSUS, by excluding items such as coloring books, crayons and pastels, slates and blackboards. Further, Customs has ruled that writing, coloring, drawing or painting lack the significant manipulative play value associated with toys. Therefore, the set is not classifiable as a toy set.

Rather, it may be classified according to General Rule of Interpretation (GRI) 3, as goods put up in sets for retail sale. GRI 3(b) directs goods put up in sets for retail sale be classified by the component which imparts the essential character of the set. Customs believes that the transfers impart the essential character. Therefore, the set is classifiable in subheading 4908.90.00, which provides for "Transfers (decalcomanias): other."

Pursuant to 19 U.S.C. 1625(c)(1), Customs is revoking HQ 959232, and any other ruling not specifically identified, to reflect the proper classification of the subject merchandise or substantially similar merchandise, pursuant to the analyses set forth in HQ 965703, which is attached to this document. Additionally, pursuant to 19 U.S.C. 1625(c)(2), Customs is revoking any treatment previously accorded by the Customs Service to substantially identical merchandise.

In accordance with 19 U.S.C.(c), this ruling will become effective 60 days after publication in the CUSTOMS BULLETIN.

Dated: August 13, 2002.

MARVIN AMERNICK,
(for Myles B. Harmon, Acting Director,
Commercial Rulings Division.)

[Attachments]

[ATTACHMENT]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, August 13, 2002.

CLA–2 RR:CR:GC 965703 DBS
Category: Classification
Tariff No. 4908.90.00

MR. BARRY LEVY, ESQ.
SHARRETTS, PALEY, CARTER & BLAUVELT, P.C.
67 Broad Street
New York, NY 10004

Re: "Tattoo Graphix"; HQ 959232 revoked.

DEAR MR. LEVY:

On June 2, 1998, this office issued to you Headquarters Ruling (HQ) 959232, classifying "Tattoo Graphix" as a toy set in subheading 9503.70.00 of the Harmonized Tariff Schedule of the United States (HTSUS). HQ 959232 revoked HQ 957894, dated December 14, 1995, in which Customs had classified "Tattoo Graphix" in subheading 3926.10.00, HTSUS. We have reconsidered HQ 959232 and believe that although the revocation of HQ 957894 was proper, classification in subheading 9503.70.00, HTSUS, was not. We are therefore revoking the classification determination made in HQ 959232.

Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. 1625(c)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act, Pub. L. 103–182, 107 Stat. 2057, 2186 (1993), notice of the proposed revocation of the above identified ruling was published on July 10, 2002, in the CUSTOMS BULLETIN, Volume 36, Number 28. No comments were received in response to the notice.

Facts:

The facts, as recited in HQ 959232, are as follows:

> ["Tattoo Graphix"], identified as item no. 7007, contains the materials needed to "[m]ake lots of cool & creepy tattoos!" The article is composed of a plastic carrying case/storage case/drawing surface (described as a "creepy crawlers Tattoo machine"), six sheets of tattoo designs, four non-toxic, colored markers, thirty sheets of blank tattoo paper, one plastic water applicator bottle, and a sheet of instructions, all of which are imported in a decorative cardboard box. The article is designed for use by children ages five and up. A child chooses a tattoo design to place under the tattoo paper in the case's frame. The design is then traced and colored on the tattoo paper and cut out (scissors not included). After the child's skin is moistened, the tattoo is placed on the skin, pressed or rubbed, then peeled back to reveal the tattoo. A child may also create his/her own designs. The retail package, which is suitable for direct sale without repacking, measures approximately 14 inches in length by 10 inches in height by 2 inches in depth.

In HQ 957894, classification of the instant merchandise as a toy set of subheading 9503.70, HTSUS, was dismissed for two reasons. Customs stated that items were princi-

pally used for tracing, drawing, cutting and transferring, rather than for amusement. Customs found that the carrying case predominated over the other components because it directly related to the tracing, drawing, cutting and transferring of the decal since it was used as a carrying case, a storage case and a drawing surface. Customs instead classified the merchandise as goods put up in a set for retail sale according to GRI 3(b), which directs that the component that imparts the essential character of the set controls the set's classification. Customs found that the essential character of the set was the carrying case because it predominated over the other articles in the set by bulk, value and the multiple roles the case played in relation to the use of the set. The set was classified in subheading 3926.10, HTSUS, which at that time provided for plastic office or school supplies.

In HQ 959232, Customs reconsidered HQ 957894, and determined that there was no basis to impose a rule that because the carrying case predominated over the other components, that it could not be a toy set. Customs ruled that because the items in the set were intended for use together to occupy the user in an amusing way, that it met the requirements for a toy, and specifically a toy set, thus classifying "Tattoo Graphix" in subheading 9503.70, HTSUS.

Issue:

Whether "Tattoo Graphix" is classifiable as a toy set of subheading 9503.70, HTSUS.

Law and Analysis:

Classification under the HTSUS is made in accordance with the General Rules of Interpretation (GRIs). GRI 1 provides that the classification of goods shall be determined according to the terms of the headings of the tariff schedule and any relative Section or Chapter Notes. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRIs may then be applied.

In understanding the language of the HTSUS, the Harmonized Commodity Description and Coding System Explanatory Notes (ENs) may be utilized. ENs, though not dispositive or legally binding, provide commentary on the scope of each heading of the HTSUS, and are the official interpretation of the Harmonized System at the international level. Customs believes the ENs should always be consulted. See T.D. 89–80, 54 Fed. Reg. 35127, 35128 (August 23, 1989).

The HTSUS provisions under consideration are as follows:

4908	Transfers (decalcomanias)
4908.90.00	Other
* * * * * * *	
9503	Other toys; reduced-size ("scale") models and similar recreational models, working or not; puzzles of all kinds; parts and accessories thereof:
9503.70.00	Other toys, put up in sets or outfits, and parts and accessories thereof:

Subheading 9503.70.00, HTSUS, is an *eo nomine*, or specifically enumerated, provision for a toy set. The Subheading EN for 9503.70, HTSUS, explains that "sets" and "outfits" of the subheading are "[s]ubject to substantiated classification in heading 9503 * * *." That is, to be a set or outfit of subheading 9503.70, HTSUS, the group of articles put up as a set or outfit must first be classifiable as a toy (or other article) of heading 9503, HTSUS. Therefore, we must determine whether the goods are toys.

The term "toy" is not defined in the HTSUS. However, the general EN for Chapter 95 states that the "Chapter covers toys of all kinds whether designed for the amusement of children or adults." The court construes heading 9503 as a "principal use" provision, insofar as it pertains to "toys." *See Minnetonka Brands v. United States*, 110 F. Supp. 2d 1020, 1026 (CIT 2000).

The EN for heading 9503 excludes transfers (decalcomanias) of heading 4908, HTSUS which provides *eo nomine* for transfers. Transfers are described in the ENs, in pertinent part, as follows:

> The EN 49.08 states, in pertinent part:
>
> Transfers (decalcomanias) consist of pictures, designs or lettering in single or multiple colours, lithographed or otherwise printed on absorbent, lightweight paper (or sometimes thin transparent sheeting of plastics), coated with a preparation, such as of starch and gum, to receive the imprint which is itself coated with an adhesive * * *.

> When the printed paper is moistened and applied with slight pressure to a permanent surface (e.g., glass, pottery, wood, metal, stone or paper), the coating printed with the picture, etc., is transferred to the permanent surface.

The EN also provides: "Transfers produced and supplied mainly for the amusement of children are also covered by this heading."

Decalcomania is defined in Merriam-Webster's Collegiate Dictionary, 10th ed, as "the art or process of transferring pictures and designs from specially prepared paper (as to glass)." The merchandise at issue includes designs printed on paper that allows transfer to the skin when moistened. It also includes blank paper upon which designs may be drawn, and then transferred to the skin in the same manner as the printed ones. These types of temporary tattoos are transfers (decalcomanias). Moreover, Customs has always classified temporary tattoos that are printed on paper that allows transfer to the skin once moistened under heading 4908, HTSUS. *See, e.g.,* NY 879936, dated November 18, 1992; NY 88605, dated June 1, 1993; NY C89816, dated June 27, 1998; NY G86280, dated January 22, 2001; NY H88827, dated March 4, 2002. Therefore, the type of temporary tattoo that is transferred with moisture and pressure from paper to skin is excluded from classification in heading 9503, HTSUS.

In addition, the Tattoo Graphix set is designed to allow children to create his or her own tattoos with tattoo paper and markers. The ENs exclude from heading 9503, HTSUS, certain articles that are used to draw and color, when those items are individually presented. The ENs state, in part, that heading 9503 excludes:

> "(c) Children's picture, drawing or colouring books of heading 49.03. * * * (h) Crayons and pastels for children's use, of heading 96.09. * * * (ij) Slates and blackboards, of heading 96.10."

Taken together, these exclusions and the EN for subheading 9503.70, HTSUS, suggest that sets comprised of materials used for drawing are not classifiable as a toy or toy set. Moreover, Customs has never considered writing, coloring, drawing or painting to have significant "manipulative play value," for purposes of classification as a toy. Nor does Customs classify the tools for writing, coloring, drawing or painting as toys since those tools are not designed to amuse. *See* HQ 085267, dated May 9, 1990, (ruling "Graffiti Gear" was not a toy set because coloring lacks manipulative play value); HQ 960420, dated July 25, 1997 (determining that a set consisting of washable markers and stuffed textile items printed with designs was not a toy set); and HQ 962355, dated January 5, 2000 (ruling that four types of coloring sets were not classifiable as toy sets but rather as a GRI 3(b) sets classifiable by the article comprising the colored or decorated craft and not the act of drawing).

Given the above, "Tattoo Graphix," a set of items that includes already-made transfers and supplies to draw/color designs for transfers, neither can be classified as a toy of heading 9503, HTSUS, nor as a toy set of heading 9503.70.00, HTSUS.

As the merchandise is not a GRI 1 toy set classifiable in heading 9503, HTSUS, we turn to GRI 3, which provides for goods that are *prima facie* classifiable under two or more headings. GRI 3(b) instructs that mixtures, composite goods, and goods put up in sets for retail sale shall be classified by the component which gives them their essential character. The components must either be considered as a set or classified individually. The components constitute "goods put up in sets for retail sale," if they satisfy the following criteria set forth in EN (X) to GRI 3(b). Goods are classified as sets put up for retail sale if they:

> (a) consist of at least two different articles which are, *prima facie*, classifiable in different headings. Therefore, for example, six fondue forks cannot be regarded as a set within the meaning of this Rule;
>
> (b) consist of products or articles put up together to meet a particular need or carry out a specific activity; and
>
> (c) are put up in a manner suitable for sale directly to users without repacking (e.g., in boxes or cases or on boards).

We find these goods qualify as a set because the articles are classifiable in at least two headings (i.e., transfers in heading 4908, markers in heading 9608, plastic bottle in heading 3923, etc.), they are put up to carry out the specific activity of creating temporary tattoos, and they are packaged together in a manner suitable for sale directly to the user without repacking in a decorative cardboard box.

The EN VIII to GRI 3(b), states, "The factor which determines essential character will vary as between different kinds of goods. It may, for example, be determined by the nature of the material or component, its bulk, quantity, weight or value, or by the role of a constit-

uent material in relation to the use of the goods." The transfers are the purpose of the set. All of the components contribute to making or applying transfers. Therefore, based on the role of the transfers in relation to the use of the goods, the essential character of the set is imparted by the transfers. Accordingly, the set is classifiable in heading 4908, HTSUS.

Holding:

"Tattoo Graphix" is classifiable in subheading 4908.90.00, which provides for "Transfers (decalcomanias): other."

Effect on Other Rulings:

HQ 959232, dated June 2, 1998, is hereby REVOKED. In accordance with 19 U.S.C 1625(c), this ruling will become effective 60 days after its publication in the CUSTOMS BULLETIN.

MARVIN AMERNICK,
(for Myles B. Harmon, Acting Director,
Commercial Rulings Division.)

PROPOSED REVOCATION OF RULING LETTER AND REVOCATION OF TREATMENT RELATING TO TARIFF CLASSIFICATION OF MOTOR VEHICLE PLASTIC SEAT KNOB

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of proposed revocation of a ruling letter and revocation of treatment relating to the tariff classification of motor vehicle plastic seat knob.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. 1625(c)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs intends to revoke a ruling letter pertaining to the tariff classification, under the Harmonized Tariff Schedule of the United States (HTSUS), of motor vehicle plastic seat knobs and to revoke any treatment previously accorded by the Customs Service to substantially identical transactions. Comments are invited on the correctness of the intended action.

DATE: Comments must be received on or before September 27, 2002.

ADDRESS: Written comments (preferably in triplicate) are to be addressed to U.S. Customs Service, Office of Regulations and Rulings, Attention: Regulations Branch, 1300 Pennsylvania Avenue, N.W., Washington, D.C. 20229. Submitted comments may be inspected at U.S. Customs Service, 799 9th Street, NW, Washington, D.C during regular business hours. Arrangements to inspect submitted comments should be made in advance by calling Mr. Joseph Clark at (202) 572–8768.

FOR FURTHER INFORMATION CONTACT: Keith Rudich, Commercial Rulings Division, (202) 572–8782.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On December 8, 1993, Title VI, (Customs Modernization), of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057) (hereinafter "Title VI"), became effective. Title VI amended many sections of the Tariff Act of 1930, as amended, and related laws. Two new concepts which emerge from the law are **"informed compliance"** and **"shared responsibility."** These concepts are premised on the idea that in order to maximize voluntary compliance with Customs laws and regulations, the trade community needs to be clearly and completely informed of its legal obligations. Accordingly, the law imposes a greater obligation on Customs to provide the public with improved information concerning the trade community's responsibilities and rights under the Customs and related laws. In addition, both the trade and Customs share responsibility in carrying out import requirements. For example, under section 484 of the Tariff Act of 1930, as amended, (19 U.S.C. §1484) the importer of record is responsible for using reasonable care to enter, classify and value imported merchandise, and provide any other information necessary to enable Customs to properly assess duties, collect accurate statistics and determine whether any other applicable legal requirement is met.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI, this notice advises interested parties that Customs intends to revoke a ruling letter pertaining to the tariff classification of motor vehicle plastic seat knobs. Although in this notice Customs is specifically referring to one ruling, NY G80939, this notice covers any rulings on this merchandise which may exist but have not been specifically identified. Customs has undertaken reasonable efforts to search existing data bases for rulings in addition to the one identified. No further rulings have been found. This notice will cover any rulings on this merchandise which may exist but have not been specifically identified. Any party who has received an interpretive ruling or decision (i.e., ruling letter, internal advice memorandum or decision or protest review decision) on the merchandise subject to this notice, should advise the Customs Service during this notice period.

Similarly, pursuant to section 625(c)(2), Tariff Act of 1930 (19 U.S.C. 1625(c)(2)), as amended by section 623 of Title VI, Customs intends to revoke any treatment previously accorded by the Customs Service to substantially identical transactions. This treatment may, among other reasons, be the result of the importer's reliance on a ruling issued to a third party, Customs personnel applying a ruling of a third party to importations of the same or similar merchandise, or the importer's or Customs previous interpretation of the Harmonized Tariff Schedule of the United States (HTSUS). Any person involved in substantially identical transactions should advise Customs during this notice period. An importer's failure to advise the Customs Service of substantially identical

transactions or of a specific ruling not identified in this notice, may raise issues of reasonable care on the part of the importer or their agents for importations of merchandise subsequent to the effective date of the final notice of this proposed action.

In NY G80939, dated August 18, 2000, set forth as "Attachment A" to this document, Customs found that the subject motor vehicle plastic seat knob was classified in subheading 9401.90.1080, HTSUS, as seats (other than those of heading 9402), whether or not convertible into beds, and parts thereof, parts, of seats of a kind used for motor vehicles, other. Customs has reviewed the matter and determined that the correct classification of the motor vehicle plastic seat knobs are in subheading 3926.30.10, HTSUS, as other articles of plastics, fittings for furniture, coachwork or the like, handles and knobs.

Pursuant to 19 U.S.C. 1625(c)(1), Customs intends to revoke NY G80939 and any other ruling not specifically identified to reflect the proper classification of the merchandise pursuant to the analysis set forth in Proposed Headquarters Ruling Letter (HQ) 965482 (see "Attachment B" to this document). Additionally, pursuant to 19 U.S.C. 1625(c)(2), Customs intends to revoke any treatment previously accorded by the Customs Service to substantially identical transactions. Before taking this action, consideration will be given to any written comments timely received.

Dated: August 9, 2002.

MARVIN AMERNICK,
(for Myles B. Harmon, Acting Director,
Commercial Rulings Division.)

[Attachments]

[ATTACHMENT A]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
New York, NY, August 18, 2000.

CLA–2–94:RR:NC:SP 233 G80939
Category: Classification
Tariff No. 9401.90.1080

MR. ROBERT J. RESETAR
PORSCHE CARS NORTH AMERICA, INC.
980 Hammond Drive Suite 1000
Atlanta, GA 30328

Re: The tariff classification of a motor vehicle plastic seat knob from Germany.

DEAR MR. RESETAR:

In your letter dated August 8, 2000, you requested a tariff classification ruling.

The submitted diagrams depict a motor vehicle seat knob made of injection molded plastic. The knob attaches onto a lever that connects to a mechanical cable that activates a latch, which holds the seat backrest in place. When moved upward, the lever/cable disen-

gages the backrest latch and allows the backrest to be moved forward for access to the back seat space. The knob is designed for and can only be used on the motor vehicle seat.

The applicable subheading for the motor vehicle plastic seat knob will be 9401.90.1080 Harmonized Tariff Schedule of the United States (HTS), which provides for seats (other than those of heading 9402), whether or not convertible into beds, and parts thereof: parts: of seats of a kind used for motor vehicles, other. The rate of duty will be free.

This ruling is being issued under the provisions of Part 177 of the Customs Regulations (19 C.F.R. 177).

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regarding the ruling, contact National Import Specialist Lawrence Mushinske at 212–637–7061.

ROBERT B. SWIERUPSKI,
Director,
National Commodity Specialist Division.

[ATTACHMENT B]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC.

CLA–2 RR:CR:GC 965482 KBR
Category: Classification
Tariff No. 3926.30.10

MR. ROBERT RESETAR
PORSCHE CARS NORTH AMERICA, INC.
980 Hammond Drive, Suite 1000
Atlanta, GA 30328

Re: Reconsideration of NY G80939; motor vehicle plastic seat knobs.

DEAR MR. RESETAR:

This is in reference to New York Ruling Letter (NY) G80939, issued to you by the Customs National Commodity Specialist Division, dated August 18, 2000, concerning the classification, under the Harmonized Tariff Schedule of the United States (HTSUS), of a motor vehicle plastic seat knob from Germany. We have reviewed that ruling and determined that the classification set forth is in error.

Facts:

NY G80939 concerned a motor vehicle plastic seat knob made of injection molded plastic. The knob attaches onto a lever that connects to a mechanical cable that activates a latch, which holds the seat backrest in place. When moved upward, the lever/cable disengages the backrest latch and allows the backrest to be moved forward for access to the back seat of the motor vehicle. The knob is dedicated for and can only be used on the motor vehicle seat. The ruling classified the seat knob in subheading 9401.90.1080, HTSUS, which provides for seats (other than those of heading 9402), whether or not convertible into beds, and parts thereof, parts, of seats of a kind used for motor vehicles, other.

Issue:

What is the classification of the motor vehicle plastic seat knob?

Law and Analysis:

Merchandise is classifiable under the Harmonized Tariff Schedule of the United States (HTSUS) in accordance with the General Rules of Interpretation (GRIs). The systematic detail of the HTSUS is such that virtually all goods are classified by application of GRI 1, that is, according to the terms of the headings of the tariff schedule and any relative Section or Chapter Notes. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRIs may then be applied.

In interpreting the headings and subheadings, Customs looks to the Harmonized Commodity Description and Coding System Explanatory Notes (EN). Although not legally binding, they provide a commentary on the scope of each heading of the HTSUS. It is Customs practice to follow, whenever possible, the terms of the ENs when interpreting the HTSUS. *See* T.D. 89–90, 54 Fed. Reg. 35127, 35128 (August 23, 1989).

The HTSUS provisions under consideration are as follows:

3926	Other articles of plastics and articles of other materials of headings 3901 to 3914:
3926.30	Fittings for furniture, coachwork or the like:
3926.30.10	Handles and knobs
8302	Base metal mountings, fittings and similar articles suitable for furniture, doors, staircases, windows, blinds, coachwork, saddlery, trunks, chests, caskets or the like; base metal hat racks, hat-pegs, brackets and similar fixtures; castors with mountings of base metal; automatic door closers of base metal; and base metal parts thereof:
8302.30	Other mountings, fittings and similar articles suitable for motor vehicles; and parts thereof:
9401	Seats (other than those of heading 9402), whether or not convertible into beds, and parts thereof:
9401.90	Parts:
9401.90.10	Of seats of a kind used for motor vehicles

NY G80939 classified the motor vehicle seat knob in subheading 9401.90.10, HTSUS. However, Chapter 94 Note 1(d), HTSUS, states that the chapter does not cover "[p]arts of general use as defined in note 2 to section XV, of base metal (section XV), or similar goods of plastics (chapter 39), or safes of heading 8303". Included within this definition of "parts of general use" are articles within heading 8302, HTSUS. The ENs for heading 8302 at paragraph (E)(5) state that this heading includes as mountings and fittings and similar articles suitable for furniture, "handles and *knobs*" (emphasis added). The ENs at (C) specifically states that articles within this heading include parts for automobiles, and in its preliminary paragraph also states that "[g]oods within such general classes remain in this heading even if they are designed for particular uses (e.g., door handles or hinges for automobiles)." *See* HQ 962183 (June 2, 1999), HQ 962046 January 13, 1999).

NY C89088 (August 8, 1998), found that a plastic knob for an automobile sunroof was a "parts of general use" and therefore the exclusionary note applied. The plastic knob was found to be a similar good to that included in heading 8302, HTSUS, but because it was plastic, the knob should therefore be classified in subheading 3926.30.10, HTSUS. *See also* NY H88198 (February 13, 2002) (involving a lumbar adjuster knob).

Therefore, Customs finds that Note 1(d) excludes the instant plastic motor vehicle seat knob from classification in Chapter 94. The classification in NY G80939 is, therefore, incorrect. Customs finds that the correct classification for the plastic motor vehicle seat knob is in subheading 3926.30.10, HTSUS, as other articles of plastics and articles of other materials of heading 3901 to 3914, fittings for furniture, coachwork and the like, handles and knobs.

Holding:

In accordance with the above discussion, the correct classification for the plastic motor vehicle seat knob is in subheading 3926.30.10, HTSUS, as other articles of plastics and articles of other materials of heading 3901 to 3914, fittings for furniture, coachwork and the like, handles and knobs.

NY G80939 dated October 9, 1997, is revoked.

MYLES B. HARMON,
Acting Director,
Commercial Rulings Division.

PROPOSED REVOCATION OF RULING LETTER AND TREATMENT RELATING TO TARIFF CLASSIFICATION OF A FORTIFIED OAT CEREAL PRODUCT

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of proposed revocation of classification ruling letter relating to the classification of a fortified oat cereal product.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. 1625(c)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs intends to revoke a ruling letter pertaining to the tariff classification of a fortified oat cereal product and any treatment previously accorded by the Customs Service to substantially identical transactions. Comments are invited on the correctness of the intended action.

DATE: Comments must be received on or before September 27, 2002.

ADDRESS: Written comments (preferably in triplicate) are to be addressed to U.S. Customs Service, Office of Regulations and Rulings, Attention: General Classification Branch, 1300 Pennsylvnia Avenue, N.W., Washington, D.C. 20229. Comments submitted may be inspected at the U.S. Customs Service, 799 9th Street, N.W., Washington, D.C. during regular business hours. Arrangements to inspect submitted comments should be made in advance by calling Mr. Joseph Clark at (202) 572–8768.

FOR FURTHER INFORMATION CONTACT: Bill Conrad, Regulations Branch, (202) 572–8764.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On December 8, 1993, Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057) (hereinafter Title VI) became effective. Title VI amended many sections of the Tariff Act of 1930, as amended, and related laws. Two new concepts which emerge from the law are **"informed compliance"** and **"shared responsibility."** These concepts are premised on the idea that in order to maximize voluntary compliance with Customs laws and regulations, the trade community needs to be clearly and completely informed of its legal obligations. Accordingly, the law imposes a greater obligation on Customs to provide the public with improved information concerning the trade community's responsibilities and rights under the Customs and related laws. In addition, both the trade and Customs share responsibility in carrying out import requirements. For example, under section 484 of the Tariff Act of 1930, as

amended (19 U.S.C. 1484), the importer of record is responsible for using reasonable care to enter, classify, and value imported merchandise, and to provide any other information necessary to enable Customs to properly assess duties, collect accurate statistics, and determine whether any other applicable legal requirement is met.

Pursuant to section 625(c)(1), Tariff Act of 1930, as amended (19 U.S.C. 1625(c)(1)) by section 623 of Title VI, this notice advises interested parties that Customs intends to revoke a ruling letter pertaining to the classification of a fortified oat cereal product. Although in this notice, Customs is specifically referring to one ruling, New York Ruling Letter NY H81626, this notice covers any rulings on this merchandise which may exist but have not been specifically identified. Customs has undertaken reasonable efforts to search existing databases for rulings in addition to the one identified. No further rulings have been found. This notice will cover any rulings on this merchandise which may exist but have not been specifically identified. Any party who has received an interpretive ruling or decision (i.e., ruling letter, internal advice memorandum or decision, or protest review decision) on the merchandise subject of this notice should advise the Customs Service during this notice period.

Similarly, pursuant to section 625(c)(2), Tariff Act of 1930, as amended (19 U.S.C. 1625(c)(2)) by section 623 of Title VI, Customs intends to revoke any treatment previously accorded by the Customs Service to substantially identical transactions. This treatment may, among other reasons, be the result of the importer's reliance on a ruling letter issued to a third party, Customs personnel applying a ruling of a third party to importations of the same or similar merchandise, or the importer's or Customs previous interpretation of the Harmonized Tariff Schedule of the United States (HTSUS). Any person involved in substantially identical transactions should advise Customs during this notice period. An importer's failure to advise the Customs Service of substantially identical transactions, or of a specific ruling not identified in this notice, may raise issues of reasonable care on the part of the importer or its agents for importations of merchandise subsequent to this notice.

In NY H81626, dated May 30, 2001, Customs classified a product referred to as a cereal product from Ireland in subheading 1904.90.0040, HTSUS, which provides for prepared foods obtained by the swelling or roasting of cereals or cereal products (for example, cornflakes); cereals (other than corn (maize)) in grain form or in the form of flakes or other worked grains (except flour, groats, and meal), pre-cooked or otherwise prepared, not elsewhere specified or included: Other: Other. This ruling letter is set forth in "Attachment A" to this document. Since the issuance of that ruling, Customs has reconsidered the ruling and determined that the classification should be changed. It is now Customs position that the subject article is classifiable under subheading 1104.22.0000, HTSUS, as otherwise worked oat cereal grains.

Customs, pursuant to 19 U.S.C. 1625(c)(1), intends to revoke NY H81626 and any other ruling not specifically identified to reflect the proper classification of the subject merchandise pursuant to the analysis set forth in Proposed Headquarters Ruling Letter (HQ) 965522 (*see* "Attachment B" to this document). Additionally, pursuant to 19 U.S.C. 1625(c)(2), Customs intends to revoke any treatment previously accorded by the Customs Service to substantially identical transactions. Before taking this action, consideration will be given to any written comments timely received.

Dated: August 9, 2002.

MARVIN AMERNICK,
(for Myles B. Harmon, Acting Director,
Commercial Rulings Division.)

[Attachments]

[ATTACHMENT A]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
New York, NY, May 30, 2001.

CLA–2–19:RR:NC:2:228 H81626
Category: Classification
Tariff No. 1904.90.0040

MR. STEPHEN DECASTRO
ALL WAYS FOWARDING INTERNATIONAL INC.
701 Newark Avenue
Elizabeth, NJ 07208

Re: The tariff classification of a cereal product from Ireland.

DEAR MR. DECASTRO:

In your letter dated May 1, 2001, on behalf of World Finer Foods, you requested a tariff classification ruling.

A description of the manufacturing process accompanied your letter. McCann's Fortified Oats is a food product composed of pre-cooked, vitamin-fortified oat groats, packed for retail sale.

The applicable subheading for this product will be 1904.90.0040, Harmonized Tariff Schedule of the United States (HTS), which provides for cereals (other than corn (maize) in grain form or in the form of flakes or other worked grains (except flour or meal), precooked or otherwise prepared, not elsewhere specified or included * * * other * * * other. The rate of duty will be 14 percent ad valorem.

This ruling is being issued under the provisions of Part 177 of the Customs Regulations (19 C.F.R. 177).

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regarding the ruling, contact National Import Specialist Stanley Hopard at 212–637–7065.

ROBERT B. SWIERUPSKI,
Director,
National Commodity Specialist Division.

[ATTACHMENT B]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC.

CLA–2 RR:CR:GC 965522 bc
Category: Classification
Tariff No. 1104.22.0000

JEFFREY S. LEVIN, ESQ.
HARRIS ELLSWORTH & LEVIN
2600 Virginia Ave., N.W., Suite 1113
Washington, DC 20037

Re: McCann's Fortified Oats; NY H81626 revoked.

DEAR MR. LEVIN:

This concerns NY H81626, dated May 30, 2001, issued to All-Ways Forwarding Int'l Inc. (All-Ways Forwarding) on behalf of World Finer Foods by the Director, Customs National Commodity Specialist Division, New York, regarding the classification of a fortified oat cereal product (McCann's) under the Harmonized Tariff Schedule of the United States (HTSUS).

As further explained below, in NY H81626, Customs classified the fortified oat cereal product at issue under subheading 1904.90.0040, HTSUS, as a pre-cooked or otherwise prepared cereal (other than corn) in grain form or in the form of other worked grains. In response to your letter of March 20, 2002, requesting reconsideration of NY H81626, we reviewed that ruling and find it to be inconsistent with the HTSUS requirements for classification of such merchandise. It is now Customs position that the fortified oat cereal product at issue is properly classifiable under subheading 1104.22.0000, HTSUS, as otherwise worked oat cereal grains. For the reasons stated below, this ruling revokes NY H81626.

Facts:

In NY H81626, issued May 30, 2001, Customs described the fortified oat cereal product there classified as follows: "McCann's Fortified Oats is a food product composed of pre-cooked, vitamin-fortified oat groats, packed for retail sale." Based on this description, Customs classified the cereal product under subheading 1904.90.0040, HTSUS, as cereals (other than corn (maize)) in grain form or in the form of flakes or other worked grains (except flour, groats, and meal), pre-cooked or otherwise prepared, not elsewhere specified or included: Other: Other. The classification ruling was issued on May 30, 2001.

In your March 20, 2002, letter, you requested reconsideration of the ruling and contended that the cereal product should be classified under subheading 1104.22.0000, HTSUS, as cereal grains otherwise worked (for example, hulled, rolled, flaked, pearled, sliced, or kibbled), except rice of heading 1006; * * *; Other worked grains (for example, hulled, pearled, sliced, or kibbled): Of oats. You set forth a description of the product and the production process with particular emphasis on the question of whether the product was subject to a pre-cooking process. You contend that the product is not pre-cooked or otherwise prepared.

Issue:

Is McCann's Fortified Oats classified as a pre-cooked or otherwise prepared cereal in grain form under heading 1904, HTSUS, or as an otherwise worked cereal grain of oats under heading 1104, HTSUS?

Law and Analysis:

Classification of goods under the HTSUS is made in accordance with the General Rules of Interpretation ("GRIs"). GRI 1 provides that classification of goods shall be determined according to the terms of the headings of the tariff schedule and any relevant Section or Chapter notes. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRIs may then be applied.

The Harmonized Commodity Description and Coding System Explanatory Notes (ENs) constitute the official interpretation of the Harmonized System at the international level. While neither legally binding nor dispositive, the ENs provide a commentary on the scope

of each heading of the HTSUS and are generally indicative of the proper interpretation of these headings. See Treasury Decision 89–80.

The HTSUS provisions under consideration are as follows:

1104	Cereal grains otherwise worked (for example, hulled, rolled, flaked, pearled, sliced, or kibbled), except rice of heading 1006; germ of cereals, whole, rolled, flaked, or ground:
1904	Prepared foods obtained by the swelling or roasting of cereals or cereal products (for example, cornflakes); cereals (other than corn (maize)) in grain form or in the form of flakes or other worked grains (except flour and meal), pre-cooked or otherwise prepared, not elsewhere specified or included:

The Customs ruling that classified the oat cereal product under heading 1904, HTSUS, was based in significant part on Customs understanding that the product had been pre-cooked during production. A description of the production process submitted by All-Ways Forwarding included two stages where heat was applied to the product. During what is designated the kilning stage, early in the process, the oats are steamed for 10 minutes at 100 degrees Celcius, kilned for 2 hours at 95–105 degrees Celcius, and cooled for 30 minutes at 25 degrees Celcius. This stage of production is designed to toast the oats for flavoring purposes and to inactivate an enzyme present in the oats that can cause rancidity. Later in the process, the oats, which are referred to as cut groats at this stage, are subjected to steam for 10 minutes to bind the vitamin mix to the cut groats and then conditioned for 40 minutes at 100 degrees Celcius. This stage of production also ensures completion of the enzyme deactivation process. In initially classifying the product, Customs believed that this second heating process constituted a pre-cooking process. Essential to this belief was the fact that a relatively short cooking time (6–7 minutes as compared to 20–30 minutes for similar product) is required to prepare the finished product for consumption. Thus, based on the conclusion that pre-cooking was involved, Customs classified the cereal product as "pre-cooked or otherwise prepared" under heading 1904, HTSUS.

In reconsidering this case, Customs has reviewed your arguments, conducted additional research, and consulted an expert in the field of oat processing. As a result, Customs acknowledges that its understanding that the product was pre-cooked, upon which NY H81626 was based, is not accurate. For the reasons set forth below, Customs now understands that the product classified in NY H81626 is not pre-cooked or otherwise prepared.

Regarding pre-cooking, Customs now believes that the reduced cooking time for the finished product at issue is primarily due to three factors. The first is the fact that the product is cut more finely than other products of this kind that require more time for cooking. (Kibbling is a grinding process that produces the finished oat pieces, but they are referred to as cut pieces.) The size of the pieces affects cooking time: the smaller the pieces, the quicker the cooking time. The second is that during the heating and conditioning process that binds the vitamin mixture to the product, the moisture content of the cut pieces is reduced, resulting in a product that is more absorbent than most similar products. The ability of the oat pieces to absorb water affects cooking time: the more absorbent the pieces, the quicker the cooking time. The third is the fact that the product is cooked by adding it directly to boiling water, resulting in more rapid hydration of the pieces and, again, a shorter cooking time.

Thus, Customs now concludes that while the second heating process involved in production of the product inevitably has some effect on cooking time, it is not a pre-cooking process. Its purpose is to bind the vitamin mixture to the oat pieces, and the shortened cooking time is predominantly the result of other factors.

Regarding the question of whether the product is "otherwise prepared," Chapter Note 4 of Chapter 19, HTSUS, provides that the expression "otherwise prepared" means prepared or processed to an extent beyond that provided for in the headings of or notes to chapter 10 or 11." The relevant preparations and processes of Chapter 11 are hulling, rolling, flaking, pearling, slicing, kibbling, and grinding. As the product at issue has undergone only the processes of hulling and kibbling (along with some other routine, incidental procedures, such as cleaning and sorting), both permitted under Chapter 11, and has not been subject to advanced processes that would constitute preparation beyond that which is permitted under Chapter 11, HTSUS, Customs concludes that the product is not otherwise prepared within the meaning of Chapter 19, HTSUS.

Holding:

Based on the foregoing findings that McCann's Fortified Oats consists of cereal grains of oats that have been hulled and kibbled, as permitted under Chapter 11, HTSUS, but not pre-cooked or otherwise prepared which would require its classification under Chapter 19, HTSUS, such product is classifiable under Chapter 11, HTSUS, specifically in subheading 1104.22.0000, HTSUS, as: Cereal grains otherwise worked (for example, hulled, rolled, flaked, pearled, sliced, or kibbled), except rice of heading 1006; * * *: Other worked grains (for example, hulled, pearled, sliced, or kibbled): Of oats.

Effect on Other Rulings:

NY H81626 is revoked.

MYLES B. HARMON
Acting Director,
Commercial Rulings Division.

PROPOSED MODIFICATION AND REVOCATION OF RULING LETTERS AND REVOCATION OF TREATMENT RELATING TO THE TARIFF CLASSIFICATION OF COTTON HEADWEAR

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of proposed modification of one ruling letter and revocation of two ruling letters and revocation of treatment relating to the tariff classification of cotton headwear.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. §1625(c)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs intends to modify one ruling letter and revoke two ruling letters relating to the tariff classification of cotton headwear under the Harmonized Tariff Schedule of the United States Annotated (HTSUSA). Similarly, Customs intends to revoke any treatment previously accorded by it to substantially identical merchandise that is contrary to the position set forth in this notice. Comments are invited as to the correctness of the proposed action.

DATE: Comments must be received on or before September 27, 2002.

ADDRESS: Written comments are to be addressed to U.S. Customs Service, Office of Regulations and Rulings, Attention: Regulations Branch, 1300 Pennsylvania Avenue, N.W., Washington, D.C. 20229. Comments submitted may be inspected at US Customs Service, 799 9th Street, N.W., Washington, D.C., during regular business hours. Arrangements to inspect submitted comments should be made in advance by calling Mr. Joseph Clark at (202) 572–8768.

FOR FURTHER INFORMATION CONTACT: Teresa Frazier, Textiles Branch (202) 572–8821.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On December 8, 1993, Title VI (Customs Modernization), of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057) (hereinafter "Title VI"), became effective. Title VI amended many sections of the Tariff Act of 1930, as amended, and related laws. Two new concepts which emerge from the law are **"informed compliance"** and **"shared responsibility"**. These concepts are premised on the idea that in order to maximize voluntary compliance with Customs laws and regulations, the trade community needs to be clearly and completely informed of its legal obligations. Accordingly, the law imposes a greater obligation on Customs to provide the public with improved information concerning the trade community's responsibilities and rights under the Customs and related laws. In addition, both the trade and Customs share responsibility in carrying out import requirements. For example, under section 484 of the Tariff Act of 1930, as amended, (19 U.S.C. §1484) the importer of record is responsible for using reasonable care to enter, classify and value imported merchandise, and provide any other information necessary to enable Customs to properly assess duties, collect accurate statistics and determine whether any other applicable legal requirement is met.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. §1625(c)(1)), as amended by section 623 of Title VI, this notice advises interested parties that Customs intends to modify one ruling letter and revoke two ruling letters relating to the classification of cotton headwear. Although in this notice Customs is specifically referring to Headquarters Ruling Letters (HQ) 084261, dated June 15, 1989, HQ 085174, dated September 7, 1989 and HQ 087327, dated July 3, 1990, this notice covers any rulings on such merchandise which may exist but have not been specifically identified. Customs has undertaken reasonable efforts to search existing databases for rulings in addition to those identified. No further rulings have been found. Any party who has received an interpretive ruling or decision (i.e., a ruling letter, internal advice memorandum or decision or protest review decision) on the issues subject to this notice, should advise Customs during the notice period.

Similarly, pursuant to section 625(c)(2), Tariff Act of 1930 (19 U.S.C. §1625(c)(2)), as amended by section 623 of Title VI, Customs intends to revoke any treatment previously accorded by Customs to substantially identical transactions. This treatment may, among other reasons, be the result of the importer's reliance on a ruling issued to a third party, Customs personnel applying a ruling of a third party to importations of the same or similar merchandise, or the importer's or Customs previous interpretation of the Harmonized Tariff Schedule of the United States Annotated (HTSUSA). Any person involved in substantially identical transactions should advise Customs during the notice period. An importer's failure to advise Customs of substantially identical transactions or of a specific ruling not identified in this notice, may raise the

rebuttable presumption of lack of reasonable care on the part of the importer or its agents for importations of merchandise subsequent to the effective date of the final decision on this notice.

In Headquarters Ruling Letter (HQ) 084261, dated June 15, 1989, Customs classified two styles of cotton headwear in subheading 6505.90.2500, Harmonized Tariff Schedule of the United States Annotated ("HTSUSA"), which essentially provided for hats and other headgear, of cotton textile fabric. In HQ 085174, dated September 7, 1989, Customs classified a polycotton cap crown in subheading 6505.90.8060, HTSUSA, which essentially provided for hats and other headgear, made up of textile fabric, of man-made fibers. In HQ 087327, dated July 3, 1990, Customs classified a cotton hood lined with Orlon® pile material also in subheading 6505.90.2500, HTSUSA, which essentially provided for hats and other headgear, of cotton textile fabric.

Since the issuance of these rulings, Customs has reviewed the classification of the merchandise and has determined that the cited rulings are in error. Accordingly, we intend to modify HQ 084261 and revoke HQ 085174 and HQ 087327, as we find the merchandise is properly classified in subheading 6505.90.2060, HTSUSA, which provides for "Hats and other headgear * * *: Other: Of cotton, flax or both: Not knitted: Certified hand-loomed and folklore products; and headwear of cotton, Other."

Pursuant to 19 U.S.C. §1625(c)(1), Customs intends to modify HQ 084261 (see "Attachment A" to this document) and revoke HQ 085174 and HQ 087327 (see "Attachments B and C" to this document), and any other ruling not specifically identified to reflect the proper classification of the merchandise pursuant to the analysis set forth in HQ 965741, HQ 963642 and HQ 963643 (see "Attachments D-F" to this document).

Additionally, pursuant to 19 U.S.C. §1625(c)(2), Customs intends to revoke any treatment previously accorded by Customs to substantially identical transactions. Before taking this action, consideration will be given to any written comments timely received.

Dated: August 12, 2002.

JOHN ELKINS,
(for Myles B. Harmon, Acting Director,
Commercial Rulings Division.)

[Attachments]

[ATTACHMENT A]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, June 15, 1989.
CLA-2 CO:R:C:G 084261 DSN
Category: Classification
Tariff No. 6505.90.2500 and 9004.10.0000

JOHN A. BESSICH, ESQUIRE
POLLICK & BESSICH, P.C.
225 Broadway, Suite 500
New York, NY 10007

Re: Classification of children's headwear and sunglasses.

DEAR MR. BESSICH:

This ruling letter is in response to your inquiry of March 17, 1989, on behalf of Arlington Hat Co., Inc., requesting tariff classification of children's headwear and sunglasses under the Harmonized Tariff Schedule of the United States Annotated (HTSUSA). The sunglasses are produced in Hong Kong while the cap is produced in China.

Facts:

The samples at issue consist of a cap, style number 1241 which is composed of cotton woven fabric with a narrow, vertical, cotton fabric loop sewn to the cap above the brim. The loop may be opened and closed by a metal snap. The loop holds a pair of plastic sunglasses. By opening the snap of the fabric loop, the sunglasses can be removed and worn by the cap wearer. In addition, the cap has two fabric loops which are sewn to each side of the cap into which the user could possibly insert the sunglasses.

Style number 264 is also a cap designed like style number 1241 except that it has two half-moon shaped panels of cotton netting material which extend back from the brim. This cap contains a pair of plastic heart-shaped sunglasses that are worn in the same fashion as style number 1241.

According to your submissions the cap and sunglasses will be imported and sold together. The sunglasses are inserted in the fabric loop where a plastic tag is used to prevent separation during shipment and at retail.

Issue:

Whether the cap and sunglasses are classified together or separately.

Law and Analysis:

Classification of merchandise under the HTSUSA is in accordance with the General Rules of Interpretation (GRI's), taken in order. GRI 3 provides for classification of sets.

GRI 3(b) provides that goods put up in sets for retail sale which cannot be classified by GRI 3(a), shall be classified as if they consisted of the material or component which give them their essential character. The Explanatory Notes constitute the official interpretation of the tariff at the international level.

The Explanatory Notes for GRI 3(b) state that goods put up in sets for retail sale are those which consist of at least two different articles which are classifiable in different headings; consist of products or articles put up together to meet a particular need or carry out a specific activity; and are put up in a manner suitable for sale directly to users without repacking.

The samples at issue consists of two articles classifiable in different headings. Heading 6505, HTSUSA, provides for hats and other headgear, knitted or crocheted, or made up from lace, felt or other textile fabric, in the piece, whether or not lined or trimmed. Heading 9004, HTSUSA, provides for spectacles, goggles and the like, corrective, protective or other.

Even though the sunglasses and cap are classifiable in different headings, the articles do not meet a particular need or carry out a specific activity. There is no need for children to wear the sunglasses while wearing the cap. The cap can be worn both outdoors and indoors, in the rain and other types of weather conditions where sunglasses would be unnecessary. The sunglasses have a separate function apart from the cap and neither article is in any way dependent on its use for the other.

Although the cap and sunglasses will be imported together their packaging suggests that they are separate and distinct articles of commerce. The sunglasses are packaged in

clear plastic bags and are inserted in the fabric loop. The sunglasses are further attached to the cap by a plastic tag to ensure that they are not separated during shipment and at retail. The cap and the sunglasses do not lose their separate identities nor their separate functions by virtue of a plastic tag that connects them.

Therefore, it is our opinion that the sunglasses and cap do not meet the requirements of a "set" for classification purposes and are classified separately under the HTSUSA.

Holding:

The sunglasses are classified under subheading 9004.10.0000, HTSUSA, which provides for spectacles, goggles and the like, corrective, protective or other, sunglasses, and dutiable at the rate of 7.2 percent ad valorem.

The cap is classified under subheading 6505.90.2500, HTSUSA, which provides for hats and other headgear, knitted or crocheted, or made up from lace, felt or other textile fabric, in the piece (but not in strips), whether or not lined or trimmed, other, other, textile category 859, and dutiable at the rate of 8 percent ad valorem.

Due to the changeable nature of the statistical annotation and the restraint (quota/visa) categories applicable to textile merchandise, you should contact your local Customs office prior to importation of this merchandise to determine the current status of any import restraints or requirements.

JOHN DURANT,
Director,
Commercial Rulings Division.

[ATTACHMENT B]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, September 7, 1989.

CLA-2:CO:R:C:G 085174 SR
Category: Classification
Tariff No. 6505.90.8060 and 6505.90.2500

MR. JACK ALSUP ALSUP & ASSOCIATES
P.O. Box 1251
Del Rio, TX 78841

Re: Cap and a cap crown.

DEAR MR. ALSUP:

This is in reference to your letter dated June 16, 1989, requesting the tariff classification of a cap and a cap crown under the Harmonized Tariff Schedule of the United States Annotated (HTSUSA). Your request for the classification of visors was issued by Customs in New York. Samples produced in Mexico were submitted.

Facts:

The merchandise at issue is a cap and a cap crown. The cap consists of a material that is 65 percent man-made fiber and 35 percent cotton. It is a standard cap with a crown and bill and it is adjustable in the back. The words "The Classic" are embroidered on the front of the crown.

The crown is made of a 65 percent polyester/35 percent cotton woven fabric with an interior stiffener made of 100 percent cotton woven fabric. The importer states that the combined weight of the cotton in the outer shell and the interior stiffener outweighs the man-made fibers. The crown will be made into a cap similar to the one at issue in this ruling. The crown has the word "Titleist" embroidered on the front.

Issue:

What is the classification of the cap and cap crown at issue?

Law and Analysis:

Classification of goods under the HTSUSA is governed by the General Rules of Interpretation (GRI). GRI 1 provides that "classification shall be determined according to the

terms of the headings and any relative section or chapter notes, and provided such headings or notes do not otherwise require, according to [the remaining GRI's taken in order]." Heading 6505, HTSUSA, provides for hats and other headgear, made up from textile material, whether or not lined or trimmed. The hat at issue is made-up of a poly/cotton blend. The chief weight of the hat is provided by the man-made fibers. According to GRI 1, the completed caps at issue must be classified under Heading 6505, HTSUSA.

With respect to the cap crowns, GRI 2(a), HTSUSA, states:

Any reference in a heading to an article shall be taken to include a reference to that article incomplete or unfinished, provided that, as entered, the incomplete or unfinished article has the essential character of the complete or finished article.

The cap crown at issue does have the essential character of a hat. It covers the head and could be worn as a hat. In its unfinished state it resembles a beanie. The chief weight of the crown is cotton.

Holding:

The cap at issue is classifiable under subheading 6505.90.8060, HTSUSA, as hats and other headgear, made up of textile fabric, whether or not lined or trimmed, of man-made fibers, other, not in part of braid, other, other. The textile category number is 659, and the rate of duty is 22 cents per kilogram, and 8 percent ad valorem.

The cap crown is classifiable under subheading 6505.90.2500, HTSUSA, as hats and other headgear, of textile fabric, whether or not lined or trimmed, other, of cotton, not knitted, other. The textile category number is 859, the rate of duty is 8 percent ad valorem.

JOHN DURANT,
Director,
Commercial Rulings Division.

[ATTACHMENT C]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, July 3, 1990.

CLA–2 CO:R:C:G 087327 JS
Category: Classification
Tariff No. 6505.90.2500

YOLANDA LANDAU
MILTON SNEDEKER CORPORATION
105 Chambers Street
New York, NY 10007

Re: Pile Lined Hood.

DEAR MS. LANDAU:

This is in reference to your letter of May 1, 1990, on behalf of RefrigiWear Inc., requesting classification of a pile lined hood under the Harmonized Tariff Schedule of the United States Annotated ("HTSUSA").

Facts:

The sample at issue is a hood made of a 100 percent cotton outer material which is lined with an orlon pile material.

There is a knit fabric edge which lines the top front opening of the hood, presumably for added warmth and wind blockage. A drawstring on the bottom edge of the hood provides an adjustable fit; a Velcro tab secures the front flap closure, and two snaps are in place at the bottom rear of the hood. According to descriptive literature included with your submission, these snaps are intended for attachment of style no. 332 jacket and style no. 543 overall manufactured by importer. The importer confirms that these latter garments are for separate purchase.

The sample will be returned under separate cover as requested.

Issue:

Whether the merchandise at issue qualifies as headgear for purposes of classification under the HTSUSA?

Law and Analysis:

Classification of merchandise under the HTSUSA is in accordance with the General Rules of Interpretation (GRI), taken in order. GRI 1 provides that the classification shall be determined according to the terms of the headings and any relevant section or chapter notes.

Heading 6505, HTSUSA, provides, in relevant part, for hats and other headgear, knitted or crocheted, or made up from lace, felt or other textile fabric, in the piece (but not in strips), whether or not lined or trimmed. The Explanatory Notes ("EN") constitute the official interpretation of the tariff at the international level. EN 65.05(9) states that the heading includes hoods. The subnote to EN 65.05(9) indicates that detachable hoods for capes, cloaks, etc., presented with the garments to which they belong, are, however, excluded, and classified with the garments according to their constituent materials. The separate importation of the subject hoods from the garments for which they are designed is substantiated by the importer's statements as well as the descriptive literature provided. Therefore, EN 65.05(9) subnote does not apply in this case, and classification is appropriate in heading 6505, HTSUSA.

Holding:

The merchandise at issue is classified under subheading 6505.90.2500, HTSUSA, which provides for hats and other headgear, knitted or crocheted, or made up from lace, felt or other textile fabric, in the piece (but not in strips), whether or not lined or trimmed; hair nets of any material, whether or not lined or trimmed; other: of cotton, flax or both: Not knitted: other, textile category number 859. The rate of duty is 8 percent ad valorem.

The designated textile and apparel category may be subdivided into parts. If so, the visa and quota requirements applicable to the subject merchandise may be affected. Since part categories are the result of international bilateral agreements which are subject to frequent renegotiations and changes, to obtain the most current information available we suggest you check, close the time of shipment, the Status Report on Current Import Quotas (Restraint Levels), an issuance of the U.S. Customs Service which is updated weekly and is available for inspection at your local Customs office.

Due to the changeable nature of the statistical annotation (the ninth and tenth digits of the classification) and the restraint (quota/visa) categories, you should contact your local Customs office prior to importation of this merchandise to determine the current status of any import restraints or requirements.

JOHN DURANT,
Director,
Commercial Operations Division.

[ATTACHMENT D]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC.

CLA-2 RR:TC:TE 965741 TMF
Category: Classification
Tariff No. 6505.90.2060

JOHN A. BESSICH, ESQ.
FOLLICK & BESSICH, P.C.
33 Walt Whitman Road, Suite 204,
Huntington, Station, NY 11746

Re: Modification of HQ 084261; children's cotton woven cap.

DEAR MR. BESSICH:

In Headquarters Ruling Letter (HQ) 084261, issued to you, June 15, 1989, on behalf of your client, Arlington Hat Company, Inc., two styles of children's cotton woven caps were classified in subheading 6505.90.2500, Harmonized Tariff Schedule of the United States

Annotated ("HTSUSA"), which essentially provided for hats and other headgear, of cotton textile fabric.

Upon review of HQ 084261, Customs has determined that the caps were erroneously classified. Therefore, this ruling modifies HQ 084261.

Facts:

Style number 1241 is a children's cap that is composed of cotton woven fabric with a narrow, vertical, cotton fabric loop sewn to the cap above the brim. The loop may be opened and closed by a metal snap. The loop holds a pair of plastic sunglasses. By opening the snap of the fabric loop, the sunglasses can be removed and worn by the cap wearer. In addition, the cap has two fabric loops that are sewn to each side of the cap into which the user could possibly insert the sunglasses.

Style number 264 is a children's cap that is designed like style number 1241 except that it has two half-moon shaped panels of cotton netting material which extend back from the brim. This cap contains a pair of plastic heart-shaped sunglasses that are worn in the same fashion as style number 1241.

In HQ 084261, it is stated that the submissions indicated that the cap and sunglasses were to be imported and sold together. In its determination, Customs considered whether the components constituted a set or were separately classifiable. Customs ruled that the goods were not a set pursuant to GRI 3(b) and classified the caps separately in subheading 6505.90.2500, HTSUSA.

Issue:

What is the classification of the children's caps within the Harmonized Tariff Schedule of the United States Annotated (HTSUSA)?

Law and Analysis:

Merchandise is classifiable under the Harmonized Tariff Schedule of the United States Annotated (HTSUSA) in accordance with the General Rules of Interpretation (GRIs). GRI 1 provides that classification shall be determined according to the terms of the headings and any relative Section or Chapter Notes. Where goods cannot be classified solely on the basis of GRI 1 and if the headings or legal notes do not require otherwise, the remaining GRIs 2 through 6 may be applied.

Additionally, the Harmonized Commodity Description and Coding System Explanatory Notes (ENs) are the official interpretation of the Harmonized System at the international level. While neither legally binding nor dispositive, the ENs provide a commentary on the scope of each heading of the HTSUSA. *See* T.D. 89–80, 54 Fed. Reg. 35127, 35128 (August 23, 1989).

Both styles of headwear are composed of woven cotton. Both styles are headgear as they entirely cover the wearer's head. A cap is a type of headgear. *Merriam Webster's Collegiate Dictionary*, Tenth Edition (1999), defines headgear as a covering or protective device for the head. Rulings issued by Customs have based the definition of headgear on the *Random House Dictionary of the English Language*, Unabridged Edition (1983), which describes headgear as "any covering for the head, esp. a hat, cap, bonnet, etc." *See* HQ 087539, dated September 20, 1990.[1] In the instant case, the merchandise at issue is children's caps. We refer to the General Explanatory Note to Chapter 65, which offers an expansive definition of the term "headgear":

> With the **exception** of the articles listed below [*see footnote 2*] this Chapter covers hat-shapes, hat-forms, hat bodies and hoods, and hats and other headgear of all kinds,

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[1] In HQ 087539, it is noted that "Certain articles (wigs, shawls, veils) which may be worn on the head are excluded from Chapter 65 either by the Chapter Notes or the Explanatory Notes, while other articles such as headphones are provided for in heading 8518, HTSUSA. Finally, we do not consider headbands, sweatbands and barrettes, which are worn on the head or in the hair in order to keep hair out of the eyes or off the forehead to be classifiable as headgear."

[2] The noted exceptions to Chapter 65 are as follows:

(a) Headgear for animals (heading 42.01).
(b) Shawls, scarves, mantillas, veils and the like (heading 61.17 or 62.14).
(c) Headgear showing signs of appreciable wear and presented in bulk, bales, sacks or similar bulk packings (heading 63.09).
(d) Wigs and the like (heading 67.04).
(e) Asbestos headgear (heading 68.12).
(f) Dolls' hats, other toy hats or carnival articles (Chapter 95).
(g) Various articles used as hat trimmings (buckles, clasps, badges, feathers, artificial flowers, etc.) when not incorporated in headgear (appropriate headings).

irrespective of the materials of which they are made and of their intended use (daily wear, theatre, disguise, protection, etc.).

It also covers hair-nets of any material and certain specified fittings for headgear.

The hats and other headgear of this Chapter may incorporate trimmings of various kinds and of any material, including trimmings made of the materials of Chapter 71.

As the caps are composed of woven cotton, we refer to subheading 6505.90.2060, which provides, *eo nomine*, for headwear of cotton. Therefore, we find the subject merchandise is classified in subheading 6505.90.2060, HTSUSA. For additional rulings consistent with this determination, *see* HQ 958958, dated September 12, 1997 (classifying three separate styles of cotton caps within subheading 6505.90.2060, HTSUSA) and HQ 087825, dated September 5, 1990 (modifying HQ 087060, dated August 17, 1990 and classifying a woven 100% cotton twill cap within subheading 6505.90.2060).

Holding:

HQ 084261, dated June 15, 1989, is hereby modified.

The children's cotton woven caps, styles 1241 and 264, are classified in subheading 6505.90.2060, HTSUSA, textile category 359, which provides for "Hats and other headgear * * *: Other: Of cotton, flax or both: Not knitted: Certified hand-loomed and folklore products; and headwear of cotton, Other." The general column one duty rate is 7.6 percent *ad valorem*.

The designated textile and apparel category may be subdivided into parts. If so, the visa and quota requirements applicable to the subject merchandise may be affected. Since part categories are the result of international bilateral agreements which are subject to frequent renegotiations and changes, to obtain the most current information available, we suggest you check, close to the time of shipment, the *Status Report On Current Import Quotas (Restraint Levels)*, an internal issuance of the U.S. Customs Service which is updated weekly and is available for inspection at your local Customs office. The *Status Report on Current Import Quotas (Restraint Levels)* is also available on the Customs Electronic Bulletin Board (CEBB) which can be found on the U.S. Customs Service Website at www.customs.gov.

Due to the changeable nature of the statistical annotation (the ninth and tenth digits of the classification) and the restraint (quota/visa) categories, you should contact your local Customs office prior to importation of this merchandise to determine the current status of any import restraints or requirements.

MYLES B. HARMON,
Acting Director,
Commercial Rulings Division.

[ATTACHMENT E]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC.

CLA–2 RR:TC:TE 963642 TMF
Category: Classification
Tariff No. 6505.90.2060

MR. JACK ALSUP, ESQ.
ALSUP & ASSOCIATES
P.O. Box 1251
Del Rio, TX 78841

Re: Revocation of HQ 085174; cotton/polyester cap and cap crown.

DEAR MR. ALSUP:

In Headquarters Ruling Letter (HQ) 085174, issued to you, September 7, 1989, Customs classified a cap and cap crown in subheadings 6505.90.8060 and 6505.90.2500, Harmonized Tariff Schedule of the United States Annotated ("HTSUSA"), respectively.

Subheading 6505.90.8060 essentially provided for hats and other headgear, made up of textile fabric, of man-made fibers. Subheading 6505.90.2500 essentially provided for hats and other headgear, of cotton textile fabric.

Upon review of HQ 085174, Customs has determined that this merchandise was erroneously classified. Therefore, this ruling revokes HQ 085174.

Facts:

The merchandise at issue is a cap and a cap crown. The cap is composed of a 65 percent polyester/35 percent cotton woven fabric. It is a standard cap with a crown and bill and it is adjustable in the back. The words "The Classic" are embroidered on the front of the crown.

The crown is made of a 65 percent polyester/35 percent cotton woven fabric with an interior stiffener made of 100 percent cotton woven fabric. The importer states that the combined weight of the cotton in the outer shell and the interior stiffener outweighs the fabric of man-made fibers. The crown was to be made into a cap similar to the one at issue. The crown had the word "Titleist" embroidered on the front.

Issue:

What is the classification of the subject cap and cap crown within the Harmonized Tariff Schedule of the United States Annotated (HTSUSA)?

Law and Analysis:

Merchandise is classifiable under the Harmonized Tariff Schedule of the United States Annotated (HTSUSA) in accordance with the General Rules of Interpretation (GRIs). GRI 1 provides that classification shall be determined according to the terms of the headings and any relative Section or Chapter Notes. Where goods cannot be classified solely on the basis of GRI 1 and if the headings or legal notes do not require otherwise, the remaining GRIs 2 through 6 may be applied.

Additionally, the Harmonized Commodity Description and Coding System Explanatory Notes (ENs) are the official interpretation of the Harmonized System at the international level. While neither legally binding nor dispositive, the ENs provide a commentary on the scope of each heading of the HTSUSA. *See* T.D. 89–80, 54 Fed. Reg. 35127, 35128 (August 23, 1989).

The cap is a type of headgear. *Merriam Webster's Collegiate Dictionary*, Tenth Edition (1999), defines headgear as a covering or protective device for the head. Rulings issued by Customs have based the definition of headgear on the *Random House Dictionary of the English Language*, Unabridged Edition (1983), which describes headgear as "any covering for the head, esp. a hat, cap, bonnet, etc." *See* HQ 087539, dated September 20, 1990.[1] We refer to the General Explanatory Note to Chapter 65, which offers an expansive definition of the term "headgear":

> With the **exception** of the articles listed below [*see footnote 2*] this Chapter covers hat-shapes, hat-forms, hat bodies and hoods, and hats and other headgear of all kinds, irrespective of the materials of which they are made and of their intended use (daily wear, theatre, disguise, protection, etc.).
>
> It also covers hair-nets of any material and certain specified fittings for headgear.
>
> The hats and other headgear of this Chapter may incorporate trimmings of various kinds and of any material, including trimmings made of the materials of Chapter 71.

Concerning the cap crown, it was noted in HQ 085174, that "In its unfinished state, it resembles a beanie." *Merriam Webster's Collegiate Dictionary*, defines "beanie" as a small

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[1] In HQ 087539, it is noted that "Certain articles (wigs, shawls, veils) which may be worn on the head are excluded from Chapter 65 either by the Chapter Notes or the Explanatory Notes, while other articles such as headphones are provided for in heading 8518, HTSUSA. Finally, we do not consider headbands, sweatbands and barrettes, which are worn on the head or in the hair in order to keep hair out of the eyes or off the forehead to be classifiable as headgear."

[2] The noted exceptions to Chapter 65 are as follows:

(a) Headgear for animals (heading 42.01).
(b) Shawls, scarves, mantillas, veils and the like (heading 61.17 or 62.14).
(c) Headgear showing signs of appreciable wear and presented in bulk, bales, sacks or similar bulk packings (heading 63.09).
(d) Wigs and the like (heading 67.04).
(e) Asbestos headgear (heading 68.12).
(f) Dolls' hats, other toy hats or carnival articles (Chapter 95).
(g) Various articles used as hat trimmings (buckles, clasps, badges, feathers, artificial flowers, etc.) when not incorporated in headgear (appropriate headings).

round tight-fitting skullcap worn especially by schoolboys and college freshmen. Therefore, as the merchandise entirely covers the wearer's head, we consider the cap crown to be a type of headwear.

Further, the crown likely constitutes an incomplete or unfinished cap. Where merchandise is incomplete or unfinished, we look to GRI 2(a), which provides, in pertinent part:

> Any reference in a heading to an article shall be taken to include a reference to that article incomplete or unfinished, provided that, as entered, the incomplete or unfinished article has the essential character of the complete or finished article.

We find that the cap crown has the essential character of the complete cap. Both articles are composed of 65 percent polyester and 35 percent woven cotton with an interior stiffener of 100 percent cotton. We refer to Note 2(A) to Section XI which states, in part:

> Goods classifiable in chapters 50 to 55 or in heading 5809 or 5902 and of a mixture of two or more textile materials are to be classified as if consisting wholly of that one textile material which predominates by weight over each other single textile material.

This note is applicable to the merchandise at issue by application of Additional U.S. Rule of Interpretation 1(d) which states that "the principles of section XI regarding mixtures of two or more textile materials shall apply to the classification of goods in any provision in which a textile material is named."

The outer surface of both the cap and crown is composed of a woven blend of 65 percent polyester and 35 percent cotton and each has an interior stiffener made of 100 percent cotton woven fabric. Customs properly determined that the combined weight of the cotton outershell and the interior stiffener weighs more than the polyester material pursuant to Section Note 2(A). The cap was therefore misclassified in subheading 6505.90.8060, HTSUSA because its cotton material outweighs the fabric of man-made fibers. As the cotton predominates by weight over the polyester material, the cap is classified within subheading 6505.90.2060, HTSUSA. Since the cap crown has the essential character of the complete or finished cap, it is classified in this same provision as headwear of cotton.

Holding:

HQ 085174, dated September 7, 1989, is hereby revoked.

The cap and cap crown are classified in subheading 6505.90.2060, HTSUSA, textile category 359, which provides for "Hats and other headgear * * *: Other: Of cotton, flax or both: Not knitted: Certified hand-loomed and folklore products; and headwear of cotton, Other." The general column one duty rate is 7.6 percent *ad valorem*.

The designated textile and apparel category may be subdivided into parts. If so, the visa and quota requirements applicable to the subject merchandise may be affected. Since part categories are the result of international bilateral agreements which are subject to frequent renegotiations and changes, to obtain the most current information available, we suggest you check, close to the time of shipment, the *Status Report On Current Import Quotas (Restraint Levels)*, an internal issuance of the U.S. Customs Service which is updated weekly and is available for inspection at your local Customs office. The *Status Report on Current Import Quotas (Restraint Levels)* is also available on the Customs Electronic Bulletin Board (CEBB) which can be found on the U.S. Customs Service Website at www.customs.gov.

Due to the changeable nature of the statistical annotation (the ninth and tenth digits of the classification) and the restraint (quota/visa) categories, you should contact your local Customs office prior to importation of this merchandise to determine the current status of any import restraints or requirements.

MYLES B. HARMON,
Acting Director,
Commercial Rulings Division.

[ATTACHMENT F]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC.

CLA–2 RR:TC:TE 963643 TMF
Category: Classification
Tariff No. 6505.90.2060

YOLANDA LANDAU
MILTON SNEDEKER CORPORATION
105 Chambers Street
New York, NY 10007

Re: Revocation of HQ 087327; cotton hood with Orlon® pile lining.

DEAR MS. LANDAU:

In Headquarters Ruling Letter (HQ) 087327, issued to you, July 3, 1990, Customs classified a cotton hood with Orlon® pile lining in subheading 6505.90.2500, Harmonized Tariff Schedule of the United States Annotated ("HTSUSA"), which essentially provided for hats and other headgear, of cotton textile fabric.

Upon review of HQ 087327, Customs has determined that the hood was erroneously classified. Therefore, this ruling revokes HQ 087327.

Facts:

The article at issue is described in HQ 087327 as being a hood made of a 100 percent cotton outer material which was lined with an Orlon® pile material. (Orlon® is a trademark owned by Du Pont for acrylic staple fiber.) A knit fabric edge lined the top front opening of the hood, presumably for added warmth and wind blockage. A drawstring on the bottom edge of the hood provided an adjustable fit; a hook and loop tab secured the front flap closure, and two snaps were in place at the bottom rear of the hood. The descriptive literature included with the submission stated that the snaps were intended for attachment of style no. 332 jacket and style no. 543 overall manufactured by importer, either of which were available for separate purchase, but the hood at issue is imported separately.

Issue:

What is the classification of the cotton hood within the Harmonized Tariff Schedule of the United States Annotated (HTSUSA)?

Law and Analysis:

Merchandise is classifiable under the Harmonized Tariff Schedule of the United States Annotated (HTSUSA) in accordance with the General Rules of Interpretation (GRIs). GRI 1 provides that classification shall be determined according to the terms of the headings and any relative Section or Chapter Notes. Where goods cannot be classified solely on the basis of GRI 1 and if the headings or legal notes do not require otherwise, the remaining GRIs 2 through 6 may be applied.

Additionally, the Harmonized Commodity Description and Coding System Explanatory Notes (ENs) are the official interpretation of the Harmonized System at the international level. While neither legally binding nor dispositive, the ENs provide a commentary on the scope of each heading of the HTSUSA. *See* T.D. 89–80, 54 Fed. Reg. 35127, 35128 (August 23, 1989).

Merriam Webster's Collegiate Dictionary, Tenth Edition (1999), defines headgear as a covering or protective device for the head. Rulings issued by Customs have based the definition of headgear on the *Random House Dictionary of the English Language*, Unabridged Edition (1983), which describes headgear as "any covering for the head, esp. a hat, cap, bonnet, etc." *See* HQ 087539, dated September 20, 1990.[1] We refer to the General

[1] In HQ 087539, it is noted that "Certain articles (wigs, shawls, veils) which may be worn on the head are excluded from Chapter 65 either by the Chapter Notes or the Explanatory Notes, while other articles such as headphones are provided for in heading 8518, HTSUSA. Finally, we do not consider headbands, sweatbands and barrettes, which are worn on the head or in the hair in order to keep hair out of the eyes or off the forehead to be classifiable as headgear."

Explanatory Note to Chapter 65, which offers an expansive definition of the term "headgear":

> With the **exception** of the articles listed below [*see footnote 2*] this Chapter covers hat-shapes, hat-forms, hat bodies and hoods, and hats and other headgear of all kinds, irrespective of the materials of which they are made and of their intended use (daily wear, theatre, disguise, protection, etc.).
>
> It also covers hairnets of any material and certain specified fittings for headgear.
>
> The hats and other headgear of this Chapter may incorporate trimmings of various kinds and of any material, including trimmings made of the materials of Chapter 71.

EN (9) to heading 6505 indicates that the heading covers "Hoods," and that detachable hoods presented with the garments to which they belong are excluded from heading 6505 and classified with the garments according to their constituent materials. In the instant case as the hood is imported separately from the jacket and overalls, it is classified within heading 6505.

The outer surface of the hood is composed of 100 percent woven cotton fabric. Orlon® pile material lines the inside. Since the hood is composed of more than one material, we look to GRI 2(b), which, in pertinent part, states:

> [t]he classification of goods consisting of more than one material or substance shall be according to the principles of rule 3.

GRI 3 provides:

> When, by application of rule 2(b) or for any other reason, goods are, *prima facie*, classifiable under two or more headings, classification shall be effected as follows: [under GRI 3a and 3b]

GRI 3(a) directs that the headings are regarded as equally specific when each heading refers to part only of the materials contained in composite goods. In this case, the relevant headings are headings 5208, HTSUSA, which provides for woven cotton fabrics, and heading 5515 HTSUSA, which provides for other woven fabrics of synthetic staple fibers.

To determine under which provision the hood should be classified, we look to GRI 3(b), which states:

> Mixtures, composite goods consisting of different materials or made up of different components, and goods put up in sets for retail sale, which cannot be classified by reference to 3(a), shall be classified as if they consisted of the material or component which gives them their essential character, insofar as this criterion is applicable.

We must consider Explanatory Note IX to GRI 3(b), which states:

> For the purposes of this Rule, composite goods made up of different components shall be taken to mean not only those in which the components are attached to each other to form a practically inseparable whole but also those with separable components, provided these components are adapted one to the other and are mutually complementary and that together they form a whole which would not normally be offered for sale in separate parts.

The woven cotton and Orlon® fabrics are practically inseparable layers sewn together to form a hood. The interior Orlon® material provides warmth for the wearer's head and the exterior cotton is the more visible material. We find that the hood is a composite good.

As a composite good is classified by the material that imparts its essential character, we refer to Explanatory Note VIII to GRI 3(b), which provides the following guidance:

> The factor which determines essential character will vary as between different kinds of goods. It may, for example, be determined by the nature of the material or component, its bulk, quantity, weight or value, or by the role of a constituent material in relation to the use of the goods.

---

[2] The noted exceptions to Chapter 65 are as follows:

(a) Headgear for animals (heading 42.01).
(b) Shawls, scarves, mantillas, veils and the like (heading 61.17 or 62.14).
(c) Headgear showing signs of appreciable wear and presented in bulk, bales, sacks or similar bulk packings (heading 63.09).
(d) Wigs and the like (heading 67.04).
(e) Asbestos headgear (heading 68.12).
(f) Dolls' hats, other toy hats or carnival articles (Chapter 95).
(g) Various articles used as hat trimmings (buckles, clasps, badges, feathers, artificial flowers, etc.) when not incorporated in headgear (appropriate headings).

In this case, the outer surface of cotton most significantly contributes to the overall appearance of the hood; it being far more visible to the eye than the Orlon® material. Further, the outer surface of cotton provides the shape of the hood as well as being capable of matching and attaching to the separately sold jacket and overalls. Therefore, we find that the outer surface of cotton imparts the hood's essential character.

In light of the above analysis, the hood is classified in subheading 6505.90.2060, HTSUSA, which provides, *eo nomine*, for headwear of cotton.

Holding:

HQ 087327, dated July 3, 1990, is hereby revoked.

The woven cotton hood is classified in subheading 6505.90.2060, HTSUSA, textile category 359, which provides for "Hats and other headgear * * *: Other: Of cotton, flax or both: Not knitted: Certified hand-loomed and folklore products; and headwear of cotton, Other." The general column one duty rate is 7.6 percent *ad valorem*.

The designated textile and apparel category may be subdivided into parts. If so, the visa and quota requirements applicable to the subject merchandise may be affected. Since part categories are the result of international bilateral agreements which are subject to frequent renegotiations and changes, to obtain the most current information available, we suggest you check, close to the time of shipment, the *Status Report On Current Import Quotas (Restraint Levels)*, an internal issuance of the U.S. Customs Service which is updated weekly and is available for inspection at your local Customs office. The *Status Report on Current Import Quotas (Restraint Levels)* is also available on the Customs Electronic Bulletin Board (CEBB) which can be found on the U.S. Customs Service Website at www.customs.gov.

Due to the changeable nature of the statistical annotation (the ninth and tenth digits of the classification) and the restraint (quota/visa) categories, you should contact your local Customs office prior to importation of this merchandise to determine the current status of any import restraints or requirements.

MYLES B. HARMON,
Acting Director,
Commercial Rulings Division.

PROPOSED MODIFICATION OF TWO RULING LETTERS AND TREATMENT RELATING TO TARIFF CLASSIFICATION OF SLEEP GARMENTS

AGENCY: U.S. Customs Service; Department of the Treasury.

ACTION: Notice of proposed modification of two tariff classification ruling letters and treatment relating to the classification of certain sleepwear garments.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. 1625(c)), this notice advises interested parties that Customs intends to modify New York Ruling Letter (NY) I80792, issued April 25, 2002, relating to the tariff classification under the Harmonized Tariff Schedule of the United States Annotated (HTSUSA), of a man's sleep pants, style 505–0503, and NY H80784, issued June 5, 2001, relating to the tariff classification under the HTSUSA, of a woman's two piece pajama set, style 733808. Similarly, Customs proposes to revoke any treatment previously accorded by it to substantially identical merchandise. Comments are invited on the correctness of the intended actions.

DATE: Comments must be received on or before September 27, 2002.

ADDRESS: Written comments are to be addressed to U.S. Customs Service, Office of Regulations and Rulings, Attention: Regulations Branch, 1300 Pennsylvania Avenue, NW, Washington, D.C. 20229. Submitted comments may be inspected at U.S. Customs Service, 799 9th Street, NW, Washington, D.C. during regular business hours. Arrangements to inspect submitted comments should be made in advance by calling Mr. Joseph Clark at (202) 572–8768.

FOR FURTHER INFORMATION CONTACT: Shirley Greitzer, Textiles Branch: (202) 572–8823.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On December 8, 1993, Title VI, (Customs Modernization), of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057) (hereinafter "Title VI"), became effective. Title VI amended many sections of the Tariff Act of 1930, as amended, and related laws. Two new concepts which emerge from the law are **"informed compliance"** and **"shared responsibility."** These concepts are premised on the idea that in order to maximize voluntary compliance with Customs laws and regulations, the trade community needs to be clearly and completely informed of its legal obligations. Accordingly, the law imposes a greater obligation on Customs to provide the public with improved information concerning the trade community's responsibilities and rights under the Customs and related laws. In addition, both the trade and Customs share responsibility in carrying out import requirements. For example, under section 484 of the Tariff Act of 1930, as amended (19 U.S.C. §1484), the importer of record is responsible for using reasonable care to enter, classify and value imported merchandise, and provide any other information necessary to enable Customs to properly assess duties, collect accurate statistics and determine whether any other applicable legal requirement is met.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI, this notice advises interested parties that Customs intends to modify two rulings relating to the tariff classification of sleepwear. Although in this notice Customs is specifically referring to the modification of New York decisions (NY) I80792, dated April 25, 2002, (attachment A), and NY H80784, dated June 5, 2001, (attachment B), this notice covers any rulings on this merchandise which may exist but have not been specifically identified. Customs has undertaken reasonable efforts to search existing data bases for rulings in addition to the ones identified. No further rulings have been found. Any party who has received an interpretive ruling or decision (i.e., ruling letter, internal advice memorandum or decision or protest review decision) on the merchandise subject to this notice, should advise Customs during this notice period. Similarly, pursuant to section 625(c)(2), Tariff Act of 1930 (19 U.S.C. 1625(c)(2)), as amended by sec-

tion 623 of Title VI, Customs intends to revoke any treatment previously accorded by Customs to substantially identical merchandise. This treatment may, among other reasons, be the result of the importer's reliance on a ruling issued to a third party, Customs personnel applying a ruling of a third party to importations of the same or similar merchandise, or the importer's or Customs previous interpretation of the HTSUSA. Any person involved with substantially identical merchandise should advise Customs during this notice period. An importer's failure to advise Customs of substantially identical merchandise or of a specific ruling not identified in this notice, may raise issues of reasonable care on the part of the importer or their agents for importations of merchandise subsequent to the effective date of the final decision on this notice.

In NY I80792, Customs classified a man's sleep pant, style 505–0503, under heading 6203, HTSUS, which provides for, among other things, men's trousers. Customs has reviewed the classification of the man's garment and has determined to modify NY I80792 to reflect the proper classification of the garment under subheading 6207, HTSUS, the provision for men's pajamas and similar articles.

Similarly, in NY H80784 Customs classified a woman's two piece pajama set, style 733808, under headings 6106 and 6104, HTSUS, which provide for, among other things, women's blouses and trousers, respectively.

Customs has reviewed the classification of these garments and has determined that the cited rulings are partially in error. Accordingly, we intend to modify NY I80792 to reflect the proper classification of style 505–0503 under subheading 6207.91.3010, HTSUSA, as men's woven cotton sleepwear, other than nightshirts or pajamas. We also intend to modify NY H80784 to reflect the proper classification of the style 733808 under subheading 6108.31.0010, HTSUSA, as cotton pajamas. Proposed Headquarters Ruling Letter 965633 modifying NY I80792, is set forth as "Attachment C" and proposed Headquarters Ruling Letter 965561 modifying NY H80784, is set forth as "Attachment D"

Pursuant to 19 U.S.C. 1625(c)(1), Customs intends to modify NY I80792 and NY H80784 and any other ruling not specifically identified, to reflect the proper classification of the merchandise pursuant to the analysis set forth in proposed HQ 965633 and HQ 965561. Additionally, pursuant to 19 U.S.C. 1625(c)(2), Customs intends to revoke any treatment previously accorded by Customs to substantially identical merchandise. Before taking this action, consideration will be given to any written comments timely received.

Dated: August 13, 2002.

JOHN ELKINS,
(for Myles B. Harmon, Acting Director,
Commercial Rulings Division.)

[Attachments]

[ATTACHMENT A]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
New York, NY, April 25, 2002.

CLA–2–62:RR:NC:WA:355 I80792
Category: Classification
Tariff No. 6203.42.4015 and 6207.91.3010

MS. DANA MOBLEY
J.C. PENNEY PURCHASING CORP.
P.O. Box 10001
Dallas, TX 75301

Re: The tariff classification of men's lounge and sleep pants from Indonesia.

DEAR MS. MOBLEY:

In your letter dated April 19, 2002, you requested a classification ruling.

You submitted two samples of men's lower body garments which you identified as sleepwear pants, styles 505–0503 and 505–0503A. Both are made of 100 percent woven cotton and will be imported in sizes small to extra large. Your samples will be returned as you have requested.

Style 505–0503 has a covered elasticized waistband with a drawstring. It does not have pockets. The front fly is not secured by any means, however, it is noted that the opening is sewn down for approximately two and a half inches from the waistband and the actual opening is much smaller than that which is usual in the trade. The opening does not gap; modesty is preserved.

Style 505–0503A has a covered elasticized waistband with a drawstring, two side seam pockets and an open fly with no means of securing it closed. Unlike style 505–0503, this fly opening begins just under the waistband and continues for a normal length. A slight gapping of the fly opening is observed.

The applicable subheading for style 505–0503 will be 6203.42.4015, Harmonized Tariff Schedule of the United States (HTS), which provides for men's or boys' trousers, bib and brace overalls, breeches and shorts, of cotton, other, other, trousers and breeches, men's, other. The duty rate will be 16.8 percent ad valorem.

The applicable subheading for style 505–0503A will be 6207.91.3010, HTS, which provides for men's or boys' singlets and other undershirts, underpants, briefs, nightshirts, pajamas, bathrobes, dressing gowns and similar articles, other, of cotton, other, sleepwear. The duty rate will be 6.2 percent ad valorem.

Style 505–0503 falls within textile category designation 347. Style 505–0503A falls within textile category designation 351. Based upon international textile trade agreements products of Indonesia are subject to quota and the requirement of a visa.

The designated textile and apparel categories and their quota and visa status are the result of international agreements that are subject to frequent renegotiations and changes. To obtain the most current information, we suggest that you check, close to the time of shipment, the *U.S. Customs Service Textile Status Report*, an internal issuance of the U.S. Customs Service, which is available at the Customs Web site at www.customs.gov. In addition, the designated textile and apparel categories may be subdivided into parts. If so, visa and quota requirements applicable to the subject merchandise may be affected and should also be verified at the time of shipment.

This ruling is being issued under the provisions of Part 177 of the Customs Regulations (19 C.F.R. 177).

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regarding the ruling, contact National Import Specialist Camille R. Ferraro at 646–733–3046.

ROBERT B. SWIERUPSKI,
Director,
National Commodity Specialist Division.

[ATTACHMENT B]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
New York, NY, June 5, 2001.
CLA–2–61:RR:NC:TA:361 H80784
Category: Classification
Tariff No. 6104.62.2011, 6104.63.2011,
6106.10.0010, and 6106.20.2010

MS. JULIE GIMM
BDP INTERNATIONAL INC.
2721 Walker N.W.
Grand Rapids, MI 49504

Re: The tariff classification of three women's garments from Taiwan.

DEAR MS. GIMM:

In your letter dated May 18, 2001, you requested a classification ruling for four women's garments on behalf of Meijer Distribution. Samples were provided and will be returned, as you requested.

You have described style 733808 as a pajama set. This style is constructed from 60% cotton, 40% polyester knit fabric, and consists of a shirt styled top and pull-on pants. The top is made mainly from two different types of fabric: thermal knit raglan sleeves; and a front and back of jersey that has been brushed on the inside. The top has more than ten stitches per centimeter in both the horizontal and vertical directions. The top has a banded neckline; a full front opening with button closure; long sleeves with rib knit cuffs; and a hemmed bottom. The pull-on pants are mainly constructed from the thermal knit fabric, and have an elasticized waistband; and rib knit cuffs at the leg openings.

You have also described style 733786 as a pajama set. This style is constructed from 100% polyester knit fabric heavily brushed on both sides and consists of a pullover shirt styled top and coordinating pull-on pants. The fabric has more than ten stitches per centimeter in both the horizontal and vertical directions. The top has a rounded neckline; a partial placket opening with a three-button closure; a chest pocket; long sleeves with cuffs; and a hemmed bottom with three-inch side slits. The pants of this style have an elasticized waistband and hemmed leg openings.

You have referred to these garments as sleepwear, however, based on appearance, they seem to be capable of multiple uses. As such, and in the absence of persuasive information as to the manner in which they are marketed and sold, these garments will not be classified as sleepwear in heading 6108.

The applicable subheading for the top of style 733808 will be 6106.10.0010, Harmonized Tariff Schedule of the United States (HTS), which provides for women's blouses and shirts, knitted or crocheted, cotton. The rate of duty will be 20.1 percent ad valorem.

The applicable subheading for the top of style 733786 will be 6106.20.2010, Harmonized Tariff Schedule of the United States (HTS), which provides for women's blouses and shirts, knitted or crocheted, of man-made fibers. The rate of duty will be 32.8 percent ad valorem.

The applicable subheading for the pants of style 733808 will be 6104.62.2011, Harmonized Tariff Schedule of the United States (HTS), which provides for women's knit trousers of cotton. The rate of duty will be 15.4 percent ad valorem.

The applicable subheading for the pants of style 733786 will be 6104.63.2011, Harmonized Tariff Schedule of the United States (HTS), which provides for women's knit trousers of synthetic fibers. The rate of duty will be 28.7 percent ad valorem.

The top of style 733808 falls within textile category designation 339; the top of style 733786 falls within textile category designation 639; the pants of style 733808 fall within textile category designation 338; the pants of style 733786 fall within textile category designation 648. Based upon international textile trade agreements products of Taiwan are subject to quota and the requirement of a visa.

The designated textile and apparel categories and their quota and visa status are the result of international agreements that are subject to frequent renegotiations and changes. To obtain the most current information, we suggest that you check, close to the time of shipment, the *U.S. Customs Service Textile Status Report*, an internal issuance of the U.S. Customs Service, which is available at the Customs Web Site at WWW.CUSTOMS.GOV. In addition, the designated textile and apparel categories may be subdivided into parts. If so,

visa and quota requirements applicable to the subject merchandise may be affected and should also be verified at the time of shipment.

This ruling is being issued under the provisions of Part 177 of the Customs Regulations (19 C.F.R. 177).

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regarding the ruling, contact National Import Specialist Angela De Gaetano at 212–637–7029.

ROBERT B. SWIERUPSKI,
Director,
National Commodity Specialist Division.

[ATTACHMENT C]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC.

CLA–2 RR:CR:TE 965633 SG
Category: Classification
Tariff No. 6207.91.3010

MS. DANA N. MOBLEY
CUSTOMS ANALYST
JCPENNEY PURCHASING CORPORATION
P.O. Box 10001
Dallas, TX 75301

Re: Modification of New York Ruling Letter (NY) I80792, dated April 25, 2002; Men's Sleep Pants from Indonesia.

DEAR MS. MOBLEY:

This letter is in response to your letter dated May 7, 2002, in which you requested reconsideration of New York Ruling Letter (NY) I80792, issued on April 25, 2002, in which Customs classified a men's garment, style 505–0503, in subheading 6203.42.4015, Harmonized Tariff Schedule of the United States Annotated (HTSUSA), which provides for men's and boys' trousers, bib and brace overalls, breeches and shorts, of cotton, other, other, trousers and breeches, men's, other. Your letter along with a sample was forwarded to this office for our reply. We have reviewed the ruling and have found it to be partially in error. Therefore, this ruling modifies NY I80792.

Facts:

The merchandise at issue is described as a pair of men's 100 percent woven cotton sleepwear pant, JCPenney style number 505–0503. The garment has an elasticized waistband with a fully functional drawstring, and hemmed pant leg bottoms. The pants do not have pockets. It has a placketed fly approximately 8 inches in length. The fly is sewn shut for 2.5 inches from the top of the waistband and sewn shut from the bottom for 2 inches, leaving an unsecured fly opening of approximately 4½ inches.

It is claimed that although the open fly is smaller than some sleepwear pants, the wearer would not wear this garment outside without a closure. It is also claimed that the fact that the garment does not have pockets in which to carry keys or change, the wearer would likely not wear these outside of the home. It is claimed that the correct classification is under subheading 6207.91.3010, as men's sleepwear.

Issue:

Whether the merchandise, style 505–0503, was properly classified as an outerwear garment under heading 6203, HTSUS, or is a sleepwear garment under heading 6207, HTSUS?

Law and Analysis:

The General Rules of Interpretation (GRI's) govern classification of goods under the HTSUSA. GRI 1 provides that classification shall be determined according to the terms of

the headings and any relative section or chapter notes. Merchandise that cannot be classified in accordance with GRI 1 is to be classified in accordance with subsequent GRI's taken in order. The Harmonized Commodity Description and Coding System Explanatory Notes (ENs), although not dispositive nor legally binding, provide a commentary on the scope of each heading of the HTSUSA and are generally indicative of the proper interpretation of these headings. See T.D. 89–80, 54 Fed. Reg. 35127, 35128, (August 23, 1989).

In order to determine whether or not the garment is sleepwear, Customs considers the factors discussed in two decisions of the Court of International Trade. In *Mast Industries, Inc. v United States*, 9 CIT 549, 552 (1985), aff'd 786 F.2d 1144 (CAFC, April 1, 1986), the court dealt with the classification of a garment claimed to be sleepwear and cited *Webster's Third New International Dictionary* which defined "nightclothes" as "garments to be worn to bed." In *Mast*, the court ruled that the garments at issue were designed, manufactured, and marketed as nightwear and were chiefly used as nightwear. Similarly, in *St. Eve International, Inc. v. United States*, 11 CIT 224 (1987), the court ruled that the garments at issue were designed, manufactured, and advertised as sleepwear and were chiefly used as sleepwear.

In the recent case of *International Home Textile, Inc. v. United States*, 21 CIT 280, March 18, 1997, the Court of International Trade addressed the issue of whether certain men's garments were properly classified under the provision for cotton pants, shorts and tops or as sleepwear under the HTSUSA. The court held that in order to be classified as sleepwear, the loungewear items at issue must share that essential character of being for a "private activity", e.g., sleeping. The court also stated that garments classified as sleepwear would be inappropriate for use at "informal social occasions in and around the home, and for other individual, non-private activities in and around the house e.g., watching movies at home with guests, barbequing at a backyard gathering, doing outside home and yard maintenance work, washing the car, walking the dog, and the like."

In past rulings, Customs has stated that the crucial factor in the classification of a garment is the garment itself. As the court pointed out in *Mast*, "the merchandise itself may be strong evidence of use." *Mast* at 552, citing *United States v. Bruce Duncan Co.*, 50 CCPA 43, 46, C.A.D. 817 (1963). However, when presented with a garment which is somewhat ambiguous and not clearly recognizable as sleepwear or underwear or outerwear, Customs will consider other factors such as environment of sale, advertising and marketing, recognition in the trade of virtually identical merchandise, and documentation incidental to the purchase and sale of the merchandise; such as purchase orders, invoices, and other internal documentation. It should be noted that Customs considers these factors in totality and no single factor is determinative of classification as each of these factors viewed alone may be flawed. For instance, Customs recognizes that internal documentation and descriptions on invoices may be self-serving as was noted by the court in *Regaliti, Inc. v. United States*, 16 CIT 407 (May 21, 1992). We have long acknowledged that intimate apparel/sleepwear departments often sell a variety of merchandise besides intimate apparel, including garments intended to be worn as outerwear. See Headquarters Ruling Letter (HQ) 955341 of May 12, 1994.

In the instant case, a physical examination of the garment at issue reveals that the design is somewhat ambiguous due to both the styling features and the smaller than usual opening of the unsecured fly. It is our view that although the unsecured fly opening is somewhat smaller than those we have seen on comparable garments, the unsecured fly opening is large enough that is does not satisfy the conventional standards of modesty necessary on a garment that would be worn for the type of non-private activities named in *International Home Textiles, Inc.* An open fly is a feature whose defining characteristic is privateness or private activity, which is indicative of sleepwear and pajamas.

Although the subject garment could possibly be used for social activity inside the home, it is our view that because of the unsecured fly; it would be inappropriate to wear this garment while participating in any "* * * non-private activities in and around the house * * *.". It is our view that this use would be a fugitive use. In *Hampco Apparel, Inc. v. United States*, 12 CIT 92 (1988), the Court of International Trade stated: "The fact that a garment could have a fugitive use or uses does not take it out of the classification of its original and primary use. The primary design, construction, and function of an article will be determinative of classification, whether or not there is an incidental or subordinate function." In this case, because the submitted sample is capable of being used to lounge inside the home does not change what is its principal use and character as sleepwear. Thus, it is our determination that this garment has the essential character of privateness, i.e. of

being used for the private activity of sleeping. The garment identified as style 505–0503 is therefore properly classifiable as a sleep garment, not outerwear. See HQ 963519, dated July 16, 2002, wherein we ruled that almost identical pants were classified as sleepwear.

Heading 6207, HTSUS, provides for, *inter alia*, pajamas and similar articles. Customs has consistently ruled that pajamas are generally two-piece garments worn for sleeping, one-piece garments such as these under consideration have been classified as other woven sleepwear.

Holding:

The instant merchandise is properly classifiable under the provision for "Men's or boys' singlets and other undershirts, underpants, briefs, nightshirts, pajamas, bathrobes, dressing gowns and similar articles: Other: Of cotton: Other: Sleepwear", in subheading 6207.91.3010, HTSUSA, and is dutiable under the general column one rate of 6.2 percent ad valorem. The textile category for this provision is 351.

NY I80792 issued on April 25, 2002, is hereby MODIFIED.

The designated textile and apparel category may be subdivided into parts. If so, the visa and quota requirements applicable to the subject merchandise may be affected. Since part categories are the result of international bilateral agreements which are subject to frequent renegotiations and changes, to obtain the most current information available, we suggest you check, close to the time of shipment, the *Status Report On Current Import Quotas (Restraint Levels)*, an internal issuance of the U.S. Customs Service which is updated weekly and is available for inspection at your local Customs office. The *Status Report on Current Import Quota (Restraint Levels)* is also available on the Customs Electronic Bulletin Board (CEBB) which can be found on the U.S. Customs Service Website at www.customs.treas.gov.

Due to the changeable nature of the statistical annotation (the ninth and tenth digits of the classification) and the restraint (quota/visa) categories, you should contact your local Customs office prior to importation of this merchandise to determine the current status of any import restraints or requirements.

MYLES B. HARMON,
Acting Director,
Commercial Rulings Division.

[ATTACHMENT D]

DEPARTMENT OF THE TREASURY.
U.S. CUSTOMS SERVICE,
Washington, DC.

CLA–2 RR:CR:TE 965561 SG
Category: Classification
Tariff No. 6108.31.0010,
6106.20.2010, and 6104.63.2011

MS. JULIE GIMM, COMPLIANCE
BDP INTERNATIONAL INC.
2721 Walker Avenue, NW
Grand Rapids, MI 49504

Re: Modification of New York Ruling Letter (NY) H80784, dated June 5, 2001; Women's Pajama Set.

DEAR MS.GIMM:

This letter is in response to your letter dated April 1, 2002, in which you requested reconsideration of New York Ruling Letter (NY) H80784, issued on June 5, 2001, in which Customs classified women's two piece "pajama sets" in heading 6106, Harmonized Tariff Schedule of the United States Annotated (HTSUSA), which provides for women's knitted blouses and shirts, and 6104, HTSUSA, which provides for women's knit trousers. We have reviewed that ruling and have found it to be partially in error. Therefore, this ruling modifies NY H80784.

Facts:

The merchandise identified as style 733808 is described as a woman's two-piece pajama set. It is constructed from 60% cotton and 40% polyester knit fabric. It consists of a shirt styled top and pull-on pants. The top features a banded neckline, full button front with one upper left chest pocket, long sleeves with rib knit cuffs, and a hemmed bottom. The pull-on pants have an elasticized waistband and rib knit cuffs at the leg openings. The top is made mainly of two different types of fabric: thermal knit raglan sleeves; and a full front and back of jersey knit that has been brushed on the inside. The top has more than ten stitches per centimeter in both the horizontal and vertical directions. The pants are mainly constructed from thermal knit fabric.

The merchandise identified as style 733786 is described as a woman's two-piece pajama set. It is constructed from 100% polyester knit fabric heavily brushed on both sides. It consists of a pullover shirt styled top and coordinating pull-on pants. The top has a rounded neckline, a partial placket opening with a three-button closure, an upper left chest pocket, long sleeves with cuffs, and a hemmed bottom with three-inch side slits. The pants have an elasticized waistband and hemmed leg openings. The fabric has more than ten stitches per centimeter in both the horizontal and vertical directions.

You advise that the pajama sets will be sold in Meijer retail stores throughout the Midwest and that both styles will be sold exclusively under the "Simple Pleasures" brand name. You indicate that "Simple Pleasures" is a Meijer private label name for apparel sold exclusively in the Meijer Sleepwear Department. You attach samples of the "Simple Pleasures" labels from the Meijer corporate brands website. You indicate that these labels will be sewn into the garments themselves. You state that the garments are sold with the intention that they will be worn as sleepwear articles and not worn outside the privacy of one's home.

Issue:

Whether the merchandise was properly classified as outerwear garments under headings 6104 and 6106, HTSUS, or is pajamas sets under heading 6108, HTSUS?

Law and Analysis:

The General Rules of Interpretation (GRI's) govern classification of goods under the HTSUSA. GRI 1 provides that classification shall be determined according to the terms of the headings and any relative section or chapter notes. Merchandise that cannot be classified in accordance with GRI 1 is to be classified in accordance with subsequent GRI's taken in order. The Harmonized Commodity Description and Coding System Explanatory Notes (ENs), although not dispositive nor legally binding, provide a commentary on the scope of each heading of the HTSUSA and are generally indicative of the proper interpretation of these headings. See T.D. 89–80, 54 Fed. Reg. 35127, 35128, (August 23,1989).

In determining the classification of garments submitted to be sleepwear, Customs usually considers the factors discussed in two court cases that addressed sleepwear. In *Mast Industries. Inc. v. United States*, 9 CIT 549, 552 (1985), aff'd 786 F.2d 144 (CAFC, 1986), the Court of International Trade considered the classification of a garment claimed to be sleepwear. The court cited several lexicographic sources, among them *Webster's Third New International Dictionary* which defined "nightclothes" as "garments to be worn to bed." In *Mast*, the court determined that the garment at issue therein was designed, manufactured, and used as nightwear and therefore was classifiable as nightwear. Similarly, in *St. Eve International. Inc. v. United States*, 11 CIT 224 (1987), the court ruled the garments at issue therein were manufactured, marketed and advertised as nightwear and were chiefly used as nightwear. Finally, in *Inner Secrets/Secretly Yours, Inc. v. United States*, 885 F. Supp. 248 (1995), the court was faced with the issue of whether women's boxer-style shorts were classifiable as "outerwear" under heading 6204' HTSUS, or as "underwear" under heading 6208, HTSUS. The court stated the following, in pertinent part:

> [P]laintiff's preferred classification is supported by evidence that the boxers in issue were designed to be worn as underwear and that such use is practical. In addition, plaintiff showed that the intimate apparel industry perceives and merchandises the boxers as underwear. While not dispositive, the manner in which plaintiff's garments are merchandised sheds light on what the industry perceives the merchandise to be. * * * Further, evidence was provided that plaintiffs merchandise is marketed as underwear. While advertisements also are not dispositive as to correct classification under the HTSUS, they are probative of the way that the importer viewed the merchandise and of the market the importer was trying to reach.

Furthermore, we bring your attention to *International Home Textile, Inc.*, 21 CIT 280, March 18, 1997, which classified garments as outerwear in headings 6103 and 6105, HTSUS. The court therein stated:

> Based upon a careful examination of the loungewear as well as the testimony of the various witnesses, the court finds that the loungewear items at issue do not share that essential character of privateness or private activity. As the parties have already stipulated, the loungewear is used primarily for lounging and not for sleeping. The court finds no basis in the exhibits, the witness testimony, or the loungewear's construction and design to find that it is inappropriate, at a minimum, for the loungewear to be worn at informal social occasions in and around the home, and for other individual, non-private activities in and around the house e.g., watching movies at home with guests, barbequing at a backyard gathering, doing outside home and yard maintenance work, washing the car, walking the dog, and the like. * * *

In your request for reconsideration you admitted that the sample garments can be worn for other than sleeping. You argue, however, that the controlling use is principal use, and that is as sleepwear. You state that the garments were designed, manufactured, marketed, and intended for use as sleepwear. In addition you claim that the print on the garments is clearly that of sleepwear and would not be worn out in public. Additionally, it is your belief that the following features are congruous with the garments classification as women's pajamas: the lack of pockets on the pants, the print used on the garments, and the loose construction and styling.

We have physically examined both of the two-piece garments at issue, and will address each separately.

Style 733786

We do not agree that the physical characteristics of the two-piece garment identified as style 733786, nor the manner in which it has been designed, marketed or sold are limited to sleepwear or intimate apparel. The physical characteristics of this style 733786 is such that it can easily be used as either sleepwear or as non-intimate apparel. The fleece fabric of which it is constructed is used for both types of garments. The appearance of this two-piece garment is, in fact, ambiguous. Although you claimed the sample was designed as sleepwear, no specific information concerning the design was submitted. Nothing about the design or appearance of the sample makes it unsuitable for use as sleepwear. However, the counter argument that nothing about the design or appearance makes the sample unsuitable for use as general apparel is equally true. In such circumstances, the principal use may be determined by the manner in which the garment is designed, marketed and sold.

In past rulings, Customs has stated that the crucial factor in the classification of a garment is the garment itself. As the court pointed out in *Mast*, "the merchandise itself may be strong evidence of use. *Mast* at 552, citng *United States v. Bruce Duncan Co.*, 50 CCPA 43, 46, C.A.D. 817 (1963). However, when presented with a garment which is somewhat ambiguous and not clearly recognizable as sleepwear or underwear or outerwear, Customs will consider other factors such as environment of sale, advertising and marketing, recognition in the trade of virtually identical merchandise, and documentation incidental to the purchase and sale of the merchandise, such as purchase orders, invoices, and other internal documentation. It should be noted that Customs considers these factors in totality and no single factor is determinative of classification as each of these factors viewed alone may be flawed. For instance, Customs recognizes that internal documentation and descriptions on invoices may be self-serving as was noted by the court in *Regaliti, Inc. v. United States*. 16 CIT 407 (May 21,1992). We have long acknowledged that intimate apparel/sleepwear departments often sell a variety of merchandise besides intimate apparel, including garments intended to be worn as outerwear. See HQ 955341 of May 12,1994.

Customs does not find the fact that "Simple Pleasures" is a private label for apparel sold exclusively in the Meijer Sleepwear Department of particular significance. What we do find of importance is the 2–piece garment itself and the manner in which the garment will be presented to the public.

The sample will be imported with a label sewn into it saying "Simple Pleasures" but nothing else. There is a sample tag on the sample garment that describes it as a "Ladies Lounge Set". No other advertising or information was submitted. Based on the above, it is our view that the information submitted does not show that the style 733786 is merchandised to the consumer as a garment to be worn exclusively, or even principally, as sleepwear.

In your submission you concede that all the submitted garments may be used as outerwear (albeit inside the home). You however argue that this use would be a fugitive use. In *Hampco Apparel, Inc. v. United States*, 12 CIT 92 (1988), the Court of International Trade stated: "The fact that a garment could have a fugitive use or uses does not take it out of the classification of its original and primary use. The primary design, construction, and function of an article will be determinative of classification, whether or not there is an incidental or subordinate function." It is your stated view that just because the sample, style 733786, is capable of being used to lounge around the home does not change the claim that its principal use and character is as sleepwear.

As the court noted in *Mast*, at 551, "most consumers purchase and use a garment in the manner in which it is marketed." In our view, style 733786 is a multi-purpose garment and nothing provided to Customs suggests the garment is presented to consumers as designed or intended for wear while sleeping. Thus, Customs does not agree that this garment is presented to consumers as sleepwear garments.

Based on our examination of the sample identified as style 733786, we find that it is loungewear, i.e., loose, casual clothes that are worn in and around the home for comfort. Its fabric, construction and design are suitable for the type of non-private activities named in *International Horne Textile, Inc.* Finally, although the garment may be worn to bed for sleeping, in our opinion its principal use is for "home comfort" and lounging. This garment can easily make the transition from inside the home (in a private setting) to outside the home (and a more social environment). In addition, the sample submitted is made of fabric heavy enough for outdoor use.

Taking into consideration all of the information before us, especially the two-piece garment (style 733786) itself, Customs believes this garment was properly classified as outerwear not as sleepwear.

Style 733808

Insofar as **style 733808** is concerned, a physical examination of the sample at issue reveals that the design is such that it can easily be used as sleepwear or as intimate apparel. We note that the hangtag on the garment states that it is a 2-piece ladies' pajama. Thus, Customs agrees that this garment is presented to consumers as a sleepwear garment.

Although the subject garment could possibly be used for social activity inside the home, it is our view that one would not wear this garment while participating in any non-private activities such as those named in *International Home Textile, Inc.* It is our view that any such use would be a fugitive use. In this case, because the submitted sample is capable of being used to lounge inside the home does not change its principal use and character as sleepwear. Thus, it is our determination that this garment has the essential character of being used for the private activity of sleeping. The garment identified as style 733808 is therefore properly classifiable as a pajama set, not as loungewear.

Holding:

The sample identified as **style 733808** is properly classifiable under the provision for "Women's or girls' slips, petticoats, briefs, panties, nightdresses, pajamas, negligees, bathrobes, dressing gowns and similar articles, knitted or crocheted: Nightdresses and pajamas: Of cotton: Women", in subheading 6108.31.0010, HTSUSA, and is dutiable under the general column one rate of 8.6 percent ad valorem. The textile category for this provision is 351.

The sample identified as **style 733786** was properly classified in NY H80784 as outerwear separates. The top is classifiable under the provision for "Women's or girls' blouses and shirts, knitted or crocheted: Of man-made fibers: Other: Women's", in subheading 6106.20.2010, HTSUSA, and is dutiable under the 2002 general column one rate of 32.5 percent ad valorem. The textile category for this provision is 639. The bottom is classifiable under the provision for "Women's or girls' suits, ensembles, suit-type jackets, blazers, dresses, skirts, divided skirts, trousers, bib and brace overalls, breeches and shorts (other than swimwear), knitted or crocheted: Trousers, bib and brace overalls, breeches and shorts: Of synthetic fibers: Other: Other: Trousers and breeches: Women's: Other", in subheading 6104.63.2011, and is dutiable under the 2002 general column one rate of 28.6 percent ad valorem. The textile category for this provision is 648.

NY H80784 issued on June 5, 2001, is hereby MODIFIED.

The designated textile and apparel category may be subdivided into parts. If so, the visa and quota requirements applicable to the subject merchandise may be affected. Since part categories are the result of international bilateral agreements which are subject to fre-

quent renegotiations and changes, to obtain the most current information available, we suggest you check, close to the time of shipment, the *Status Report On Current Import Quotas (Restraint Levels)*, an internal issuance of the U.S. Customs Service which is updated weekly and is available for inspection at your local Customs office. The *Status Report on Current Import Quota (Restraint Levels)* is also available on the Customs Electronic Bulletin Board (CEBB) which can be found on the U.S. Customs Service Website at www.customs.treas.gov.

Due to the changeable nature of the statistical annotation (the ninth and tenth digits of the classification) and the restraint (quota/visa) categories, you should contact your local Customs office prior to importation of this merchandise to determine the current status of any import restraints or requirements.

MYLES B. HARMON,
Acting Director,
Commercial Rulings Division.

United States Court of International Trade

One Federal Plaza
New York, N.Y. 10278

Chief Judge

Gregory W. Carman

Judges

Jane A. Restani
Thomas J. Aquilino, Jr.
Donald C. Pogue
Evan J. Wallach
Judith M. Barzilay
Delissa A. Ridgway
Richard K. Eaton

Senior Judges

Nicholas Tsoucalas
R. Kenton Musgrave
Richard W. Goldberg

Clerk

Leo M. Gordon

(Slip Op. 02–85)

FAG ITALIA, S.P.A., FAG BEARINGS CORP, SKF USA INC., AND SKF INDUSTRIE S.P.A., PLAINTIFFS AND DEFENDANT-INTERVENORS *v.* UNITED STATES, DEFENDANT, AND TORRINGTON CO., DEFENDANT-INTERVENOR AND PLAINTIFF

Consolidated Court No. 97–11–01984

(Dated August 7, 2002)

ORDER

TSOUCALAS, *Senior Judge:* This matter comes before the Court pursuant to the decision (May 24, 2002) of the Court of Appeals for the Federal Circuit ("CAFC") in *FAG Italia, S.p.A. v. United States,* 291 F.3d 806 (Fed. Cir. 2002), vacating in part the judgment of this Court in *FAG Italia, S.p.A. v. United States,* Slip Op. 00–82, 2000 Ct. Intl. Trade LEXIS 83 (CIT 1999).

Specifically, in accordance with the precedent set by the CAFC in *SKF USA Inc. v. United States,* 263 F.3d 1369 (Fed. Cir. 2001), the CAFC held that this case shall be remanded to Commerce for explanation "why [Commerce] uses a different definition of 'foreign like product' for price-based calculations for normal value than [Commerce] does for calculations of constructed value." *FAG Italia, S.p.A.,* 291 F.3d at 808. Accordingly, it is hereby

ORDERED that this case is remanded to Commerce to provide the necessary explanations; and it is further

ORDERED that the remand results are due within ninety (90) days of the date that this order is entered. Any responses or comments are due within thirty (30) days thereafter. Any rebuttal comments are due within fifteen (15) days after the date the responses or comments are due.

(Slip Op. 02–86)

NIPPON STEEL CORP, NKK CORP, KAWASAKI STEEL CORP, AND TOYO KOHAN CO., LTD., PLAINTIFFS *v.* UNITED STATES, DEFENDANT, AND WEIRTON STEEL CORP, DEFENDANT-INTERVENOR

Court No. 00–09–00479

[ITC injury determination vacated.]

(Dated August 9, 2002)

Willkie Farr & Gallagher *(William H. Barringer; James P. Durling; Daniel L. Porter; Sean M. Thornton; Karl von Shriltz)* for plaintiffs.

Lyn M. Schlitt, Office of General Counsel, *James M. Lyons*, Deputy General Counsel, U.S. International Trade Commission *(Laurent M. deWinter)*, for defendant.

Schagrin Associates *(Roger B. Schagrin)*, for defendant-intervenor.

OPINION

RESTANI, *Judge:* This matter comes before the court as a result of the court's decision in *Nippon Steel Corp. v. United States*, 182 F. Supp. 2d 1330 (Ct. Int'l Trade 2001) *("Nippon I")*, in which the final affirmative injury determination of the International Trade Commission (the "Commission") in *Tin- and Chromium-Coated Steel Sheet From Japan*, 65 Fed. Reg. 50005, USITC Pub. 3300, Inv. No. 731–TA–860 (final determ.) (Aug. 2000) (hereinafter "Final Determination") was remanded. Although the court found the Commission's subsidiary conclusions with respect to subject import volume supported, at least minimally, by substantial evidence, the court ordered the Commission to reevaluate its analysis of the effect of subject imports on domestic pricing, as well as its conclusions with respect to causation. Nippon Steel Corporation, NKK Corporation, Kawasaki Steel Corporation, and Toyo Kohan Co., Ltd., (collectively "Nippon" or "Plaintiffs"), respondents in the underlying investigation, contest the Commission's March 4, 2002 affirmative injury determination pursuant to remand ("Redetermination") on the grounds that the Commission's analysis of price effects and causation remain unsupported by substantial evidence.[1]

JURISDICTION AND STANDARD OF REVIEW

The Court has jurisdiction pursuant to 28 U.S.C. § 1581(c) (1994). The court will uphold the Commission's determination in an antidumping investigation unless it is "unsupported by substantial evidence in the administrative record or is otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i).

OVERVIEW

The crucial question of price effects and ultimate causation of material injury arise in the context of an industry with peculiar conditions of

[1] In its original challenge to the Commissioners' affirmative determination, Plaintiffs claimed both a lack of substantial evidence for the ITC's determination and prejudicial Congressional interference. The court found insufficient evidence to support the latter challenge. Although the court's finding that ITC had no substantial evidence for its decision may be relevant to Plaintiffs' claim of undue Congressional influence, there is no purpose to revisiting that issue because the case is fully disposed on the alternative ground.

competition. Chairman Koplan in dissent succinctly summarized these conditions, which cannot be seriously disputed by the parties or the Commission majority. He stated as follows:

> The following conditions of competition unique to the U.S. tin plate industry, which were identified in the preliminary determination, are central to my analysis: (1) tin plate is almost always sold in the United States pursuant to annual contracts that establish fixed prices and target volumes; (2) reliable delivery is extremely important to the purchasers—the domestic can making [industry]—because food must be canned as soon as possible after it reaches the canning facility;[2] (3) the purchasers have consolidated and are now highly concentrated (the six largest purchasers account for more than three-quarters of apparent domestic consumption); (4) several of the major purchasers operate canning facilities on the grounds of Weirton's mill and commit to buy a minimum volume of steel from Weirton;[3] (5) non-subject imports entered the U.S. market in a larger volume than subject imports from Japan during the period of investigation (POI) and non-subject imports occupied a greater market share than did imports from Japan; (6) most domestic producers, including petitioner Weirton, are located either on the East Coast or in the Midwest and focus their sales in regions near their mills; and (7) demand in the canning industry is affected by the harvest of agricultural goods used for canned foods.[4]

Tin- and Chromium-Coated Steel Sheet From Japan, 65 Fed. Reg. 50005, USITC Pub. 3300, Inv. No. 731–TA–860 (final determ.) (Koplan, S., dissenting) (Aug. 2000) (footnotes added). The court also notes that the U.S. producers are largely long established integrated steel producers. A new domestic producer of tin-milled products, which is said to have a cost advantage, was present during the POI.

Both dissenters found evidence of no price effects due to subject imports, based on the manner of price negotiation and setting, and the seemingly incontrovertible evidence that domestic reliability problems were a tremendous concern to the purchasers. The majority cites no evidence that can sustain its opposite conclusion.

Further, upon review of the Redetermination, the court finds that the Commission has failed to comply with the court's instructions in *Nippon I,* and either conceded, or failed to contest evidence that leads inexorably to a finding that subject imports have not caused material harm to the domestic industry.

The Commission failed to follow the court's instructions on selection and compilation of data. First, it maintained a particular purchaser's separate facilities and product types in disaggregated form. Second, the Commission ignored the court's directive to justify limiting the range of price comparisons to only those instances in which sales were ultimately

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[2] There are contractually set performance times the can producers must meet. The other dissenting commissioner noted that there are some minor non-food uses.

[3] Weirton Steel Corporation has the largest tin mill in the United States.

[4] Lack of demand was not cited as a reason for harm.

made from both Japanese and U.S. suppliers. Lastly, at times it relied solely on underselling data for one year.

In its analysis of underselling, the Commission ignored explanatory information provided by large purchasers where: (1) Silgan cited quality and service as being its two most important purchasing priorities and explained that unique manufacturing capabilities led to its decision to purchase from some off-shore sources; (2) Crown stated that it based its purchases of Japanese imports on quality considerations; and (3) the Commission failed to determine the extent to which purchasers' measurements of determinative price differentials are borne out by the purchasing histories of these purchasers.

Furthermore, in regard to the correlation between subject imports and pricing, the Commission: (1) failed to address Nippon's contention that a large purchaser—[ ]—paid increasing domestic prices at the same time it increased its purchases of subject imports; (2) failed to address the correlation between the introduction of subject import by another purchaser [ ] in 1999 and the subsequent rise in domestic prices between 1999 and 2000; (3) addressed another purchaser's [ ] ability to secure price decreases from its domestic suppliers, yet conceded that non-subject import volume largely accounted for the price decline; and (4) failed to address the lack of correlation between Silgan's purchases of subject imports and pricing, where Nippon specifically cited Silgan as evidence of a lack of correlation. Lastly, the Commission failed to assess the extent of the domestic lead-time price premium in relation to the underselling margin.

The Commission failed to take into account relevant market factors in determining price sensitivity. First, it conceded that factors such as quality and service are generally ranked higher than price by purchasers, yet concluded that the market is characterized by a high degree of price sensitivity. Furthermore, the Commission asserted that quality and reliability are important only for the purpose of qualifying suppliers, yet failed to rebut the assertion that purchasers ranked price as a low consideration in choosing among *qualified* purchasers.

The Commission failed to adequately address Nippon's contention that negotiations run on separate tracks according to different procedures and criteria. In its analysis, the Commission: (1) failed to support its conclusion that purchasers reallocate volume following the conclusion of price negotiations; (2) conceded that the existence of supply agreements cuts against the finding that competition from subject imports impacted domestic prices; (3) conceded that delivery time issues operate to limit the absolute amount of the domestic market that imports could obtain, yet failed to evaluate purchaser perceptions with respect to the domestic industry's lead-time advantage as an explanation for keeping negotiations on separate tracks with volume allocated among domestic versus foreign producers; and (4) conceded that Weirton was unable to submit any documents indicating that it set its prices

with reference to foreign importers, and provided insubstantial justification for Weirton's failure to give such support.

In its lost sale analysis, the Commission relied on a lost sale allegation, where it ignored evidence on the record undermining the likelihood that a significant sale was lost for price reasons. Also, the Commission inadequately responded to the court's concerns regarding whether on-time performance and quality concerns were the predominant cause of harm to the domestic TCCSS industry. The Commission: (1) failed to cite the sources of its individual purchaser volume data throughout its analysis; (2) appeared to use numbers from Table TCCSS–1, for its analysis of purchaser BWAY, while for the remaining purchasers it inexplicably appeared to use figures from tables in the Staff Report that conflict with Table TCCSS–1; (3) supported its position with "trends" over two year periods of time, which ignore that the full set of data indicates that there had been no clear trend at all; and (4) never accounted for the year 2000, and at times limited its analysis to the change from 1998 to 1999.

The Commission inadequately responded to the court's concerns regarding whether non-subject imports were the predominant cause of harm to the domestic TCCSS industry. It apparently conceded that non-subject import volume prevails over subject imports industry wide, and failed to provide sufficient evidence that there is a correlation between subject import volume and harm to the domestic industry on the West Coast where subject imports are concentrated. Further, by comparing bids over two year periods, the Commission created trends for pricing in the marketplace, where again no actual trends exist.

As the following discussion demonstrates, with relatively low subject import volume and market share, no substantial evidence of adverse price effects caused by subject imports and no valid links establishing causation of material injury, this case compels the conclusion that this record will support only a negative determination.

DISCUSSION

With respect to the effect of subject imports on domestic pricing, the court in *Nippon I* generally ordered the Commission on remand to: (1) reconsider its underselling findings taking into account inconsistencies in the manner in which the data were presented; (2) explain its methodology for making price comparisons for underselling; (3) indicate the basis for calculating the yearly average margin of underselling and for concluding that such margins are significant; (4) reassess its conclusions with respect to a correlation between subject import competition and domestic prices; (5) reevaluate its price sensitivity finding in light of evidence in the record; and (6) indicate the data and context upon which it bases its findings regarding lost sales. In addition, the court ordered the Commission to reassess causation taking into consideration the role of nonprice factors in purchasing decisions as well as that of non-subject imports.

I. Effect of Subject Imports on Domestic Prices

Nippon claims that the Commission failed to comply with the court's following directives: (1) to present data on customer purchase prices "in a way that will facilitate review of pricing/volume trends" and "in a reasonably consistent manner with respect to purchaser and product grouping"; and (2) to "indicate the basis for its * * * underselling analysis," and why underselling margins in 1999 were significant.[5] *Nippon I* 182 F. Supp. 2d at 1356.

A. Methodology for Making Price Comparisons

In the Preliminary Determination, the Commission analyzed underselling by comparing weighted average f.o.b. prices and quantities for U.S. producers with those for Japanese producers. *See* Preliminary Determination at V–6. In the Final Determination, however, the Commission based its underselling findings on data that included separate bidding information for a particular purchaser's[6] three different tinmill products purchased at each of its three facilities, while other large purchasers submitted a unified pricing chart detailing a single bid price for each supplier. *See* Final Determination at 15–16. Nippon argued that data for this purchaser was consequently "over-represented" on account of the Commission's methodology of counting "instances" of underselling without regard to the actual volumes purchased.

The court in *Nippon I* ordered the Commission to "present the data in a reasonably consistent manner with respect to purchaser and product grouping, as well as the expression of prices bid and paid." 182 F. Supp. 2d at 1343. Nippon claims that the Commission has not complied with the court's directive by continuing to "rely on the number of instances of underselling without first taking into account how the underlying data is grouped." *Id.* at 1342.

1. Standardization of Pricing Data

With respect to the "expression of prices bid and paid," the court expressed dissatisfaction with the Commission's unexplained division of data into two separate groups, *i.e.*, according to those purchasers who reported prices in dollar amounts and those who reported prices in terms of the discount rate from an industry list price. *See Nippon I*, 182 F. Supp. 2d at 1340 n.18. First, the Commission had not indicated the yearly list prices to which the discount rates were applied, thereby precluding the court from converting the discount rates into dollar prices, or vice versa, assuming it was inclined to do so. Simply presenting year-to-year discount rates without taking into consideration the list price may be misleading inasmuch as an increase in the list price may outstrip an increase in the discount rate. Second, the Commission's use of bifurcated data hinders review of the Commission's determinations with respect to pricing trends across the *entire* market.

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[5] Nippon does not contest the Commission's explanation of its reliance on bidding data submitted by purchasers.

[6] This purchaser is [ ].

On remand, the Commission stated that "[b]ecause of the different manners in which purchasers reported data, and differences in product mix between purchasers, we find that calculating a single rate across all purchasers would not be appropriate." Redetermination at 10. Nippon does not contest the Commission's explanation for its decision not to convert discount rates into prices, or vice versa.

2. Selection and Compilation of Price Comparison Data

With respect to purchaser and product grouping, the court in *Nippon I* found that the Commission failed to explain why it based its underselling calculations "solely on the number of individual bids from purchasers that purchased from both Japanese and domestic suppliers in a particular year, irrespective of volume," or "why it chose to reject the quarterly weighted average price calculations made in the Preliminary Determination." 182 F. Supp. 2d at 1341. The court specified that "where the Commission chooses to limit its underselling analysis to a subset of the pricing data available, the Commission must indicate the criteria it used for making the price comparisons." *Id.*

The court also ordered the Commission on remand to "account for differences in the way that data is reported in order to ensure that its calculations are accurate." *Id.* The court reasoned that "the Commission cannot ignore the manner in which the data is presented, and the Commission cannot rely on the number of instances of underselling without first taking into account how the underlying data is grouped." *Id.* Specifically, the court indicated that the Commission failed to explain why a particular purchaser's three facilities were counted separately, or why for this particular purchaser it counted separately each type of product purchased by an individual canning company, other than stating that the purchaser had reported its data in this manner. *Id.*

On remand, the Commission recompiled the data on price comparisons. The Commission created a new table counting Japanese bids below, within the range of, and above domestic bids, with the corresponding subject import volume. The Commission provided separate bidding data for the purchaser that had reported data for each of its three facilities as well as for three different varieties of TCCSS—[ ].

The Commission explained that it continued to separate out the particular purchaser's data from the rest of the purchasers for two reasons: (1) "[b]ecause the company's data were based on average unit values ("AUVs"), rather than discount rates, consolidation of the firm's data into single annual price figures posed the risk of masking price differences based on product mix or geographical considerations"; and (2) the purchaser "reported data on the basis of a May–April fiscal year that straddles individual calendar years and does not conform to the calendar year basis on which other purchasers reported data." Redetermination at 9.

Nippon claims that by segregating data for one purchaser and indicating corresponding volume, the Commission "does not place underselling in context," and that "the Commission's emphasis on the increased

volume of underbid subject imports in 1999 for purchasers other than [the segregated purchaser] and in 1999/2000 for [the same purchaser] is directly contradicted by the lack of correlation between subject import purchasers and domestic price suppression or depression for numerous individual purchasers." Pl. Br. at 2.

The court finds that the Commission's decision to keep in disaggregated form the particular purchaser's separate facilities and product types is not adequately explained or cannot be explained. Further, the court finds that the Commission has not addressed the court's principal concern—as stated in the opinion and during the summary judgment hearing—that the decision to narrow the pool of comparisons to only those instances in which sales were ultimately made from both Japanese and U.S. suppliers is seemingly unprecedented and might give skewed results. For example, by not considering instances in which bids were received from both U.S. and Japanese producers, yet purchases ultimately were made only from suppliers from one of the countries, the Commission does not assess sales actually lost. The use of such a narrow data sample also renders a misleading picture of underselling frequency, as the number of total comparisons is artificially lowered. Because the Commission ignored the court's directive to justify limiting the range of price comparisons in the manner it did, or indicate any prior application of such a limitation, the court determines that the Commission inappropriately relied on an apparently skewed picture of the extent of underselling.

Furthermore, the Commission's analysis relies solely on underselling data for one year, apparently discounting the importance of its acknowledgment that there was no underselling of any significance in 1997 or 1998. Having dispensed with the use of a trend analysis of underselling data, the Commission may not rely, as it has done in this case, on trends in subject import market share and domestic pricing to substantiate the significance of its one-year data on underselling. The court therefore finds that the Commission has not complied with its instructions to indicate the criteria for its decision to limit its underselling analysis to particular data and to explain the selection and compilation of data on underselling. Without this information, the Commission's analysis cannot be supported by substantial evidence because there is no logical connection between the facts found and the choice made. *See Burlington Truck Lines v. United States,* 371 U.S. 156, 168 (1962).

B. Underselling Analysis

In *Nippon I,* the court ordered the Commission to explain why the margin of underselling was significant, considering in particular the purchaser questionnaire responses regarding the price differential likely to induce a switch of suppliers. The court also ordered the Commission to explain whether any of the underselling reflected premiums paid to domestic producers for superior lead times.

1. Margin of Underselling

In the Final Determination, the Commission calculated an underselling margin of 2.156 percent, and found that a there was "a significant increase in the magnitude of the underselling," where "[i]n 1997 Japanese bids were generally not underselling domestic bids. In 1998, Japanese bids undersold domestic bids by 0.70 percent on average and by 1999, when subject import volume was greatest, the magnitude of underselling had risen to 5.77 percent on average." Final Determination at 16.

In *Nippon I,* the court found that the Commission had not met its burden of establishing why, assuming the margins actually exist, the margins are significant because (1) the Commission cited a non-existent table;[7] (2) the rate of increase in the margin was of limited probative value in the absence of any analysis of the range of price differentials that purchasers indicated would induce them to switch suppliers; and (3) the Commission did not analyze whether the domestic producers' undisputed lead-time advantage accounted for the margin of underselling.

On remand, the Commission found that "Japanese bids were often within the range of or higher than U.S. bids in 1997 and 1998, but were generally lower than U.S. bids in 1999," and that "[t]he instances of lower Japanese bids in 1999 represent higher volumes of subject imports than in previous years." Redetermination at 9.[8] Having dispensed with relying on an average margin, the Commission on remand focused on the margins of underselling for several larger purchasers in 1999, the only year in which it found generally lower Japanese prices.[9] From the purchaser responses', the Commission derived an overall range—two to six percent—of a price differential that would induce a switch of suppliers for 1999,[10] and concluded that the underselling margins are "generally near or at the ranges found by responding purchasers to be significant * * *." Redetermination at 12–13.

Nippon argues that the Commission's reliance on an aggregate range of price differentials and underselling margins masks that four of the six major purchasers indicated in their questionnaire responses and elsewhere that the actual underselling margins were not significant to their purchasing decisions. Nippon further argues that for one of the remaining two purchasers—[ ]—the reported price differential is not borne out by its actual purchasing history. Thus, Nippon concludes that only one major purchaser's—[ ]—underselling margin fell within its reported price differential.

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[7] On remand, the Commission indicated that the mis-cited table was in fact "Table 1—Requested by Commissioner Hillman for INV. No. 731–TA–860 (final) Tin- and Chromiumcoated Steel from Japan," which consolidated pricing data from the Staff Report.

[8] As indicated, the Commission found that "calculating a single rate across all purchasers would not be appropriate" due to "differences in product mix between purchasers" and therefore analyzes underselling data for individual purchasers. Nippon does not contest the Commission's decision to analyze underselling data on an individual purchaser basis.

[9] The Commission indicated that these margins in 1999 were as follows: [ ]. See Redetermination at 11; Purchaser Questionnaire, IV–8.

[10] The Commission noted purchaser responses as follows: [ ]. See Redetermination at 12 n. 34.

The court determines that the Commission has ignored explanatory information provided by large purchasers that give context to their responses' determinant price differential. First, [ ] did not give a price differential, instead referring the Commission to its response to Question IV–7, in which it described its purchasing criteria as follows:

> We choose steel suppliers based on 1) quality, 2) service and 3) price, in that order of importance. As a result of longer lead times (part of service) we purchase significantly less material from non-domestic producers than from U.S. sources * * *. [U]nique manufacturing capabilities of some off-shore sources drive us to purchase from them irrespective of their prices which, in most cases, are higher than U.S. producer prices.

[ ] Questionnaire Response at Question IV–7. Second, [ ] specified in its response that it "did not select the Japanese based on price, but on quality performance." [ ] Questionnaire Response at Question IV–8. Third, the margin of underselling cited by the Commission, *Redetermination* at 8, for [ ] in 1999 is not the margin found in Table V–16, [ ], below the stated determinant price differential. Rather than address these inconsistencies, the Commission merely reiterates its aggregate range figures and states that they were "generally near or at the ranges reported by purchasers to be significant * * *" ITC Br. at 3. The Commission cannot ignore purchaser comments that would give meaning to their estimates of the price differential that would induce a switch of suppliers. The Commission has also failed to determine the extent to which purchaser measurements of determinative price differentials are actually borne out by the purchasing history of these particular purchasers.[11]

The court notes that the form of the question in the Purchaser Questionnaires is a likely source of the apparent disconnect between purchaser responses regarding the slight determinative price differential and their indication that other criteria drove their pricing decisions, as well as their actual purchasing history. The questionnaire asks purchasers how much *higher* Japanese prices would have to be before they switch to a *domestic producer.* Since the Commission is attempting to analyze the extent of underselling, a more relevant question is how much *lower* Japanese prices would have to be before the purchasers would switch to a Japanese producer. Such a question necessarily would take into account purchasers' non-price considerations in making a switch of supplier. Thus, the data relied upon by the Commission in addressing the effect of underselling below a certain margin is questionable at best, as are the conclusions drawn therefrom.

2. Correlation between Subject Imports and Domestic Prices

The court in *Nippon I* found that the Commission had ignored "evidence apparently contradicting a finding of a correlation" between sub-

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[11] For example, the Commission fails to address Nippon's contention that [ ], which accounted for the bulk of the instances of underselling calculated by the Commission, represented that a [ ] increase in subject import prices would cause it to switch to domestic suppliers, but domestic purchases by this purchaser actually *increased* from 1998 to 1999, in spite of an underselling margin that increased from [ ] percent in 1998 to [ ] percent in 1999. *See* [ ] Questionnaire Response at Question IV–8; Staff Report at V–12–13.

ject import purchases and domestic price suppression and depression, holding that "where data is available," and "relied on by respondents, the Commission must address the individual purchaser data in some manner." 182 F. Supp. 2d at 1344. The court reasoned that "[p]ricing trends for a particular large purchaser may indicate the lack of a correlation between the existence of competition with Japanese imports and a decline in prices paid by that particular purchaser," and that where data on general pricing trends were admittedly mixed, the Commission should use available data to determine whether a correlation existed for particular purchasers. *Id.* The court therefore instructed the Commission to address data that apparently showed that: (1) the largest purchasers of subject imports generally paid increased prices to domestic suppliers and (2) those who purchased no subject imports were able to secure price decreases from their domestic suppliers.

On remand, the Commission reiterated its findings that subject imports generally undersold domestic producers in 1999, and that increased import volume coincided with reduced domestic volume:

> For the largest purchasers, the data indicate that (1) Japanese discount rates were higher in 1999 than the U.S. rates for the same customer; (2) Japanese prices were lower in 1999 than U.S. prices for the same customer; (3) the volumes of bids accepted from Japanese suppliers by every purchaser increased from 1997 to 1999; and (4) the volumes of bids accepted from domestic suppliers by every purchaser except Silgan decreased in 1999 compared to the volumes of bids accepted over prior periods.

Redetermination at 25.[12]

In accordance with the court's instructions, the Commission also reexamined the individual purchaser data cited by respondents as undercutting its correlation finding. The Commission first discounted the importance of evidence that a particular purchaser—[ ] paid prices apparently higher than its competitors did, notwithstanding the fact that the bulk of its purchases were from Japan. The Commission reasoned that comparing the average annual price among purchasers is likely to be of limited probative value due to the variations in product specifications among them.

Nippon asserts that the Commission's explanation ignores the court's instructions. The court agrees that, by focusing only on comparative

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[12] The court in *Nippon I* did not find error in the Commission's findings regarding general pricing and volume trends per se, and instead evaluated the extent to which the Commission addressed Nippon's contentions regarding the lack of correlation. Nippon now alleges that the Commission's finding of a general decline in subject import pricing is contradicted by evidence that [ ] accepted Japanese bids that were higher than certain accepted bids in 1999. Nippon inappropriately focuses on isolated bits of data that on the whole do not necessarily undermine the Commission's conclusions regarding overall trends.

Nippon also disputes the Commission's finding that "the volumes of bids accepted from Japanese suppliers by every purchaser increased from 1997 to 1999," on the ground that one purchaser—[ ] purchased subject imports for the first time in 1999, another—[ ]—increased its purchase of subject imports by only insignificant amounts, and another—[ ] decreased subject import purchases between 1998 and 1999. Nippon also alleges that the Commission's finding that "the volumes of bids accepted from domestic suppliers by every purchaser except Silgan decreased in 1999 compared to volumes of bids accepted over prior periods" is false. Nippon contends that two purchasers—[ ] increased domestic purchases, while another—[ ]—had reduced domestic purchases by a slight amount from 1997 to 1998, and increased domestic purchases from 1998 to 2000. The court in *Nippon I*, however, sustained the Commission's finding of low but significant subject import volume as an isolated finding and does not revisit the issue, except as it affects the ultimate causation conclusion. *See Nippon I*, 182 F. Supp. 2d at 1335–40.

pricing, the Commission ignored its instructions to address Nippon's contention that "the largest purchasers of subject imports generally paid increased prices to domestic suppliers." Although the court noted an apparent inconsistency in pricing trends for this purchaser in comparison to other purchasers, it is clear that the court did not restrict the Commission's analysis to comparative pricing across the industry. Thus, the Commission fails to address the contention that a large purchaser—[ ]—paid increasing domestic prices at the same time it increased its purchases of subject imports between 1997 and 1999. As this particular purchaser accounts for the bulk of the instances of underselling that the Commission determined to be significant, the individual purchasing history is of critical importance.

The Commission did address, however, the case of a particular purchaser—[ ]—who was able to secure price decreases from its domestic suppliers notwithstanding the lack of any purchases from Japan until 1999. The Commission noted that the purchaser's bid range of the discount rate did in fact increase over the POI, but attributed the price decline to (1) the purchaser's inability to settle at prices "substantially at odds" with its competition; (2) its purchase of substantial volumes of non-subject imports. The Commission found, however, that this purchaser's experience "indicates that non-subject imports also impacted domestic prices, but is in no way inconsistent with the conclusion, based on the experience of other purchasers, that subject imports had a significant impact as well." Redetermination at 26. Having found that a particular purchaser's non-subject imports volume largely accounted for the price decline, the Commission attempts to circumvent the implications of its concession by stating that it was "not inconsistent" with a finding that subject imports also had an impact based on the experience of other purchasers. The use of circumlocution and vaguely referencing other purchasers' experiences hardly constitutes supporting its individual purchaser determinations with substantial evidence.

The Commission also analyzed whether another purchaser—[ ]—increased its prices to domestic suppliers in 1999 despite the introduction of lower-priced bids from Japanese suppliers. The Commission found that "the data * * * do not indicate that * * * prices paid to domestic producers actually increased in 1999," as the prices were [ ] Although prices paid by this purchaser were stable from 1998–1999, the Commission omits that after the introduction of lower-priced subject import purchases in 1999, prices increased for all domestic producers over the period 1999 to 2000, the time period which the court was clearly instructing the Commission to address. Thus, in the absence of any explanation of why this lack of correlation is somehow insignificant, the court rejects the Commission's treatment of this third producer's data.

Lastly, the Commission did not address data from Silgan on the grounds that the court only drew its attention to three other purchasers, namely [ ]. The Commission omits that the court specifically instructed it to address individual purchaser data where such data is available and

"relied on by respondents." The Commission does not dispute that the respondents specifically cited the case of Silgan as evidence of a lack of correlation.

In sum, the court finds that the Commission's treatment of individual pricing data does not comply with the court's instructions and certainly does not constitute a serious analysis of large purchaser's pricing data trends that at least facially invalidates its overall correlation determination.

3. Domestic Producers' Price Premium due to Lead-Time Advantage

The court in *Nippon I* found that the Commission failed to analyze "whether the undisputed lead-time advantage held by the domestic industry in fact translated into an ability to maintain a price premium over imports, which may or may not account for the margin of underselling." 182 F. Supp. 2d at 1342. On remand, the Commission concedes that domestic producers did enjoy a lead time advantage over their Japanese competitors, and acknowledged that quicker product delivery translates into an ability to exact a price premium due to the benefit to purchasers in being able to modify purchase orders on shorter notice. Redetermination at 13. Nevertheless, the Commission found that this phenomenon was diminished by: (1) the existence of supply contracts that allow suppliers to know several quarters ahead of time how much TCCSS they are required to deliver to their customers, as evidenced by purchaser testimony regarding the superior on-time delivery of Japanese importers; and (2) purchasers' uniform assessment that Japanese TCCSS is superior in quality to domestic TCCSS.

The Commission's explanation is inconsistent with its findings regarding price sensitivity and alternative causation. The Commission found that superior on-time delivery and quality were not to such an extent as to account for purchasers' decision to switch to Japanese suppliers, *see* section C.1, *infra*, but were somehow of such an extent to minimize the price premium attributable to the domestic lead-time advantage. Even if the conceded price premium due to an acknowledged lead-time advantage were somewhat diminished, the price premium may still eclipse the underselling margin. The Commission failed to assess the extent of the price premium in relation to the underselling margin.

C. Conditions of Competition relating to Price Effects

1. Price Sensitivity

In the Final Determination, the Commission found that the TCCSS market is characterized by a high degree of price sensitivity, notwithstanding evidence that "lowest price" was ranked by purchasers seventh of approximately ten factors in terms of importance in decision-making. The court in *Nippon I* found that the Commission's price sensitivity finding was not supported by substantial evidence where it rested solely on evidence of market concentration (in terms of both supply and demand) and on the price specificity used in negotiations. 182 F. Supp.

2d at 1345–48. The court also held that "if the Commission chooses to rely on price sensitivity * * * it must assess other aspects of the TCCSS industry that would tend to reduce, if not entirely vitiate, the importance of price in purchaser decision-making," such as on-time delivery or product quality, or at least evaluate the responses regarding the price differential sufficient to induce a switch of suppliers. *Id.* at 1346.

On remand, having discounted the effect of domestic lead-time advantage, the Commission averred that the "high degree of price sensitivity" substantiates the significance of underselling. The Commission acknowledged that purchasers generally ranked "lowest price" as less important than other considerations in questionnaire responses. Nevertheless, the Commission concluded that because bids are only solicited from qualified suppliers[13] "purchasing decisions are *sometimes, or even usually,* based *mainly* on price." *Id.* at14–15 (emphasis added). The Commission further indicated that once a supplier is qualified, "the quality and reliability of that supplier's product have already been established, leaving price and volume the primary remaining factors to be negotiated." *Id.* at 15 n.47.

The Commission then restated its previous findings from the Final Determination regarding price specificity, i.e., that "[p]urchaser documents indicate that very modest changes in the discount rate could mean the difference between winning or losing contracts," and that "[p]rice is negotiated intensely in annual contract negotiations, often down to the hundredths of one percent." *Id.* at 15–16.[14] Lastly, the Commission indicated that the fact that purchasers entered into buying alliances to improve their negotiating position "emphasize[s] the central role of obtaining lower prices to the purchasers of TCCSS," although the Commission determined that such developments ultimately had a limited impact on prices during the POI. *Id.* at 16–17.[15]

Nippon argues that the Commission's finding that once a supplier is qualified, quality and reliability are no longer important considerations is unsupported by substantial evidence where questionnaire responses demonstrate that purchasers emphasize quality and reliability when choosing among qualified suppliers. The record shows that non-price factors are in fact major determinants in purchasers' decision-making, even after suppliers are deemed "qualified." *See* Staff Report at II–11 to 12.[16] Questions III–18 and IV–11 of the purchaser questionnaires clearly ask purchasers to rank the importance of "lowest price" and other considerations in choosing among qualified suppliers only. Neither the

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[13] The Commission defines qualified suppliers as those suppliers that have proven that they can deliver the desired quality and quantity in a steady and reliable manner. Redetermination at 15.

[14] The Commission relied upon a questionnaire response and an internal document of two particular purchasers, one of which involved a price difference of [ ] and the other [ ].

[15] Although the court found that the Commission's decision to discount purchaser consolidation, in isolation, was not error, there is no doubt that the opposite conclusion reached by the dissents is supported. This factor has implication for the ultimate causation decision. The Commission must assess the strength of its subsidiary findings in arriving at its final determination.

[16] The court notes the Commission's normal skepticism as to the purchasers' ranking of price considerations, but here such generalized skepticism is unwarranted. On-time reliable performance was particularly important in the TCCSS market and the Commission cannot ignore this fact in assessing purchasing decision-making.

Commission nor the Defendant-Intervenors attempt to rebut this fact. Rather, they merely reiterate that the Commission acknowledged the importance of other factors such as quality, sidestepping the court's admonition in *Nippon I* that simply noting the importance of other factors does not constitute analysis sufficient to support its conclusion. 182 F. Supp. 2d at 1346. Furthermore, the insertion of qualifying phrases such as "sometimes or even usually" and "mainly on price" only serve to undercut the Commission's overall determination that the market is characterized by a "high degree" of price sensitivity.

Although the Commission in all cases need not make specific findings with respect to price sensitivity, this condition of competition is of particular importance when the margin of underselling is slight, debatable or not markedly or universally greater than the amount of a price differential determinative of purchasing decisions, and even more so when evidence credibly indicates that non-price factors outrank the importance of price in purchaser decision-making. As the Commission has not met its burden of assessing purchaser decision making in the context of relevant market factors, the court finds the Commission's conclusion of price sensitivity unsupported by substantial evidence.

2. Negotiating Practices

In the Final Determination, the Commission found that the record reflected aggressive pricing of subject imports "has been used by at least some purchasers in their price negotiations with the domestic suppliers." Final Determination at 16. The court in *Nippon I* held that the Commission's analysis of contract negotiating practices was unsupported by substantial evidence because the Commission inappropriately rejected four large purchasers' entire testimony, and had inadequately considered evidence "support[ing] the purchaser's contention and fundamental point that negotiations run on separate tracks according to different procedures and criteria." 182 F. Supp. 2d at 1346–47. The court explained that: (a) the overlap of time in negotiation was not inconsistent with supply compartmentalization; (b) the Commission failed to adequately consider supply agreements that limit price competition to domestic suppliers; (c) the Commission did not adequately analyze the significance of long import lead times; and (d) the Commission failed to address Weirton's submission of contemporaneous pricing documents citing domestic competition, but not import competition, when it should have been motivated to submit such documentation if it existed.

a. Contemporaneity versus Compartmentalization

On remand, the Commission reiterated its findings that negotiations did not take place consecutively, and that there was a substantial overlap in time periods for negotiating. *See* Redetermination at 17. By emphasizing in *Nippon I* that the time overlap was of little consequence in light of Nippon's fundamental claim that negotiations were compartmentalized, the court drew the Commission's attention to evidence that a large TCCSS purchaser delayed concluding negotiations with foreign

producers until it had secured a certain level of volume from domestic producers, and that foreign prices aren't established until negotiations with domestic mills are concluded. *See* 182 F. Supp. 2d at 1347 n.32. The Commission did not address the extent to which such a division of major and minor tonnage and bifurcation of price negotiation was representative of TCCSS purchasers' practices. Rather, the Commission stated that the evidence suggests that "under the contract terms, while prices may be set, volumes are not; therefore, even after negotiations with domestic suppliers are concluded, purchasers can reallocate volume to non-domestic suppliers during the year (without breaking the contract) based on lower prices of imports," and that "[d]omestic producers testified that, even if a purchaser breached a contract, they were not likely to sue on and terminate the contract." Although the Commission theorizes that volume can be reallocated based on lower prices of imports, the Commission fails to cite any evidence as to whether such reallocation in fact occurred. The mere possibility that subject import pricing could induce a purchaser to reallocate volume even after prices have been set does not speak to the issue of whether prices are set wholly independently at the outset. The issue here is likely price effects.

b. Supply Agreements

On remand, the Commission determined that supply agreements were not a large factor in the market, where it found only two supply agreements limiting price competition to domestic producers, both of which pre-date the increase in subject imports, and would not have prevented purchasers from using "the possibility of additional purchases of foreign product to improve their negotiating position with domestic suppliers." Redetermination at 23–24.

Nippon alleges that the Commission ignored supply agreements on the record,[17] and that the Commission's findings do not detract from the clear evidence that agreements limiting price competition to domestic suppliers are prevalent in the TCCSS industry. Nippon further argues that the prevalence of such agreements is consistent with Weirton's practice of calculating its "pricing allowance range solely according to pricing data of domestic producers," as the court noted in *Nippon I*, 182 F. Supp. 2d at 1348.

The Commission does not address Nippon's arguments relating to the prevalence and impact of supply agreements, and merely states that it acknowledged that the existence of supply agreements "cut against a finding that competition from subject imports impacted domestic prices." ITC Br. at 10. Thus, the court finds that the Commission has conceded this point.

c. Lead Times

The court instructed the Commission to analyze "whether the acknowledged difference in lead times cause purchasers to consider foreign supply 'supplementary,' and allocate predetermined volumes to

[17] Specifically, Nippon alleges that the Commission did not address supply agreements between [ ] on the record.

foreign and domestic supply sources." *Nippon I*, 182 F. Supp. 2d at 1347. On remand, the Commission stated that "the ability of purchasers to use lower foreign prices to obtain more favorable domestic prices could be limited if it were generally understood that foreign product, because of longer lead times, could only occupy a small residual or supplementary portion of the domestic market." Redetermination at 20. The Commission conceded that "delivery time issues do operate to limit the absolute amount of the domestic market that imports could realistically hope to obtain." *Id.* The Commission found, however, that "[t]he substantial share of the market acquired by imports * * * rebuts the notion that imports can only occupy a niche position in the U.S. TCCSS market and are therefore inherently incapable of impacting the overall pricing environment." *Id.* at 21. The Commission reasons that "in an industry with relatively few players each possessing very good market knowledge," domestic producers would have felt compelled to offer lower prices to defend their market share against "rapidly rising import volumes." *Id.* at 22.

Nippon contends that market knowledge is in fact limited among TCCSS market participants, as evidenced by data for two purchasers accounting for a substantial percentage—[ ]—of the increase in subject imports over the POI that [ ].

The court finds that the Commission has mischaracterized the court's instructions, creating a straw-man argument that is easily refuted. The court did not order the Commission to determine whether subject imports could only capture a limited percentage of the market. Rather, the court instructed the Commission to evaluate purchaser perceptions with respect to the domestic industry's lead-time advantage as a potential explanation for keeping negotiations on separate tracks with volume allocated among domestic versus foreign producers. Naturally, the Commission in conducting this analysis would need to evaluate whether such a condition of competition, if it in fact existed, would have an effect on the ability of subject imports to have an effect on domestic prices. The Commission has avoided addressing this issue. Furthermore, the Commission reliance on the acceleration of subject import volume is misplaced, as the rate of increase of subject imports says nothing about allocation of volume based on risks involved in a substantial lead-time differential.[18]

d. Weirton Documentation regarding Price Competition

On remand, the Commission conceded that Weirton was unable to submit any contemporaneous documents citing import price competition, and that the lack of such documents supports the view that import and domestic contract negotiations are compartmentalized. Nevertheless, the Commission assigned little weight to the absence of such documents, in light of the fact that "purchasers failed to provide any

[18] In *Nippon I*, the court drew the Commission's attention to the Staff Report's indication that most U.S. producers were reported as being capable of delivery within 6 to 8 weeks, while most importers had lead times in the 3 to 4.5 month range. *See* Staff Report at II–13.

documentation regarding their contract negotiations with importers of Japanese product * * *." Redetermination at 22.

Nippon claims that purchasers did in fact submit documentation regarding contract negotiations with importers of Japanese product. Nippon Br. at 10 (citing Redetermination at 17 n.51). Nippon further argues that the Commission's reliance on the purported lack of such evidence is a red herring inasmuch as it does not detract from the fact that "Weirton had every incentive to submit documentary evidence of subject import competition, but could only submit documents demonstrating that its prices were calculated with reference to only domestic competitors." *Id.*

As with supply agreements, the Commission concedes that the lack of Weirton documents regarding Japanese pricing undermines a finding that subject imports had an adverse impact on domestic pricing. Nevertheless, the Commission responds that, although Nippon indicated that some evidence regarding purchaser's negotiations with foreign suppliers was in fact in the record, Nippon omits that none of the evidence substantiates its claim that subject foreign producers set their prices solely in reaction to prices previously agreed by domestic producers.

The court finds that the Commission's justification for assigning little weight to the lack of documentation regarding import price competition is unpersuasive. The court in *Nippon I* underscored the importance of Weirton's supporting documentation, as the only pricing documents submitted by Weirton apparently showed that its pricing range was determined without regard to foreign prices. 182 F. Supp. 2d at 1347–48. The court clarified that in the absence of any other pricing documentation or evidence that subject import prices fell outside of Weirton's predetermined range or that Weirton was somehow forced below its minimum price level, the court could not sustain the Commission's decision to discount the importance of Weirton's inability to substantiate the assertion that Weirton's prices were set at least in part in reaction to the presence of lower-priced Japanese imports. *Id.* Even if the Japanese producers did not submit purchaser documents on their contract negotiations with importers of subject merchandise, this fact is irrelevant to factors affecting how domestic producers set their pricing. The Commission's attempt to refute Nippon's argument speaks only to how foreign producers set their prices and says nothing about how *domestic producers* set their pricing, the fundamental issue in determining whether the presence of subject imports had an effect on domestic pricing in this case.

In sum, the Commission has not given the court any basis for sustaining its treatment of conditions of competition with regard to the effect of subject imports on domestic pricing.

3. Lost Sales and Revenue

The court in *Nippon I* found that the Commission's conclusions regarding the confirmed lost sales allegation[19] did not reflect the purchas-

[19] In the Final Determination, the Commission relied upon [ ] confirmation of [ ] lost sales allegation.

ing history data provided for the particular purchaser, and directed the Commission to "indicate the specific data upon which it relied" in confirming the allegation, notwithstanding the Commission investigator's inability to find a competing import price for the sale while conducting the on-site verification. 182 F. Supp. 2d at 1349–50.

On remand, the Commission stated that it reexamined the one lost sales allegation that the Commission determined to be confirmed by the purchaser. The Commission specified that the allegation is consistent with a lost sale of [ ] tons of chromium coated steel to a particular purchaser's—[ ]—in fiscal year 2000 where Japanese producers had underbid all domestic producers, including the producer making the allegation—[ ]. Redetermination at 28.[20] The Commission found that the volume of the lost sale, combined with that of the three lost revenue allegations, represented a substantial percentage—[ ] percent—of the market, and was therefore significant. The Commission indicated, however, that it is difficult for suppliers to identify lost sales events because annual contracts are awarded to multiple suppliers, rather than spot sales with a single supplier.

Nippon argues that the lost sale allegation remains unsupported by substantial evidence on the ground that the producer making the allegation would have lost these sales even in the absence of Japanese competition.[21]

First, it appears that the Commission is confirming a lost sale allegation that may not have been made and wasn't verified, as the Staff Report indicates that Weirton claimed it lost a sale—also involving [ ] short tons—to a Japanese producer on a quote given in *October of 1998*, not December of 1998. *Compare* Staff Report at V–22 to 25 & Table V–14 *with* Redetermination at 28. Second, if the Commission is in fact referring to the lost sale allegation described in the Staff Report, the Commission's phraseology obscures the fact that the alleged lost sale involved a rejected U.S. price of $650, when 1998 bids by Weirton to the relevant facility in FY2000 never went below [ ], and in fact was [ ] for double rolled chromium coated steel sheet ("CCSS"). Furthermore, the Commission omits that the purchaser cited longterm commitments with its Japanese supplier,[22] and that Weirton did not bid seriously for its West Coast business, thereby supporting Nippon's contention that Weirton would have lost the sale to another domestic supplier in the absence of Japanese competition.[23] Lastly, the Commission's reliance on this single lost sale allegation is undermined by the purchaser's representation that any such sale was lost for several reasons: price, quality,

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[20] The Commission explains for the first time that although the lost sale allegation involved a December 1998 quote for a 1999 delivery, the most relevant data provided by the purchaser is actually its [ ] purchases because [ ]. Nippon does not contest the Commission's application of 1998 bid quotes to FY2000 purchase volumes. The Commission does not indicate whether this lagtime was applied for [ ] in its underselling analysis, thereby casting further doubt on its conclusions of significant underselling.

[21] Specifically, Nippon alleges that [ ].

[22] The Declaration of [ ], C.R. Docs. 222–223, Nippon Appendix at Tab 8, states that:

[ ]

[23] In the Declaration, [ ] states that [ ].

delivery time, and whether the producer can supply globally. *See* Staff Report at V–25. Although in other circumstances a lost sale allegation might be confirmed and relied upon by the Commission even though other domestic producers underbid the producer making the allegation, the Commission's reliance on this particular lost sale allegation is unsupported because it ignores record evidence undermining the likelihood that a significant sale was lost for price reasons attributable to imports.

II. Causation

The court in *Nippon I* instructed the Commission to determine whether quality and delivery time issues as well as non-subject imports "'may have such a predominant effect in producing the harm as to * * * prevent the [subject] imports from being a material factor.'" *Nippon I,* 182 F. Supp. 2d at 1350 (citing *Taiwan Semiconductor Indus. Ass'n v. United States,* 59 F. Supp. 2d 1324, 1329 (Ct. Int'l Trade 1999)). On remand, the Commission found that it was not persuaded by "inconsistent and contradictory" testimony that purchasers turned to Japanese sourcing solely because of domestic quality and delivery time problems or non-subject import competition.[24] The Commission concluded that, the significant volume of subject imports at declining prices, and the frequent underselling of the domestic like product, had adversely affected the domestic TCCSS industry.

A. U.S. On-Time Performance and Quality

In the Final Determination, the Commission had acknowledged that there was documentary evidence that showed domestic producers' on-time performance was poor during the POI.[25] It was not persuaded, however, by what it found to be inconsistent and contradictory purchaser testimony that these purchasers turned to Japanese sourcing because of non-price reasons. The Commission based this determination solely on the supposedly internally contradictory testimony of U.S. Can representatives.

In *Nippon I,* the court remanded on the issues of quality and on-time delivery, finding the Commission's reasons for rejecting purchaser testimony to be ill-founded and its conclusions incapable of being reviewed properly. 182 F. Supp. 2d at 1351–52. First, the court cited the Staff Report describing U.S. Can's purchasing history as showing two sets of pricing data for U.S. Steel, while Weirton was not listed at all. Second, the court found that Mr. Yurco had consistently stated U.S. Can shifted sourcing from Weirton to other domestic producers. Third, the court determined that the Commission failed to address U.S. Can's stated concerns with Weirton's on-time performance problems, or Weirton's performance requirements in its supply contract with U.S. Can. Fourth,

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[24] The Commission had earlier discounted other causes and was not specifically ordered to reassess them, although it was ordered to reassess its overall decision to attribute material injury to subject imports.

[25] At times during the POI one major producer's on time performance did not reach 50%.

the court indicated that the Commission failed to analyze whether quality problems were indeed prevalent among U.S. producers.

On remand, the Commission found that quality and delivery time problems do not preclude a finding that price factors adversely affected the domestic TCCSS industry. In support of its analysis, it considered the circumstances of four large purchasers, who have increased purchases of subject imports. In each case, the Commission found that low prices played an important role in the decisions of the purchasers to shift toward subject imports. The Commission considered testimonial evidence from the producers that delivery and quality issues were the predominant reasons for shifting volume to subject imports, and determined that the testimony did not preclude a finding that subject imports made a material contribution to the injury.

As a preliminary matter, the Commission failed to cite the sources of its individual purchaser volume data throughout its analysis. For its analysis of BWAY, it appeared to use numbers from Table TCCSS–1, while for the remaining purchasers it inexplicably appeared to use figures from tables in the Staff Report that for some reason conflict with Table TCCSS–1. In addition, the Commission supported its position with "trends" over limited periods of time, ignoring the full set of data, and omitting that a fluctuating year-by-year analysis at best would indicate that there had been no clear trend at all. Lastly, the Table TCCSS–1 shows bid and volume numbers for the years 1997 through 2000, yet the Commission never accounted for the year 2000, and at times limited its analysis to the change from 1998 to 1999. The Commission's apparent tunnel-vision is misleading and violates the court's directive to analyze and present data in a manner that facilitates review.

1. BWAY

The Commission found BWAY to be inconsistent in its testimony that its pattern of purchases reflected its attempt to broaden its portfolio of suppliers due to quality and delivery concerns, and its need to supply geographically diverse operations. BWAY specifically cited its concern with the on-time performance of Weirton, yet increased its purchases from Weirton from 1998 to 1999.[26] The Commission concluded that increasing its supply from Weirton is inconsistent with BWAY's quality concerns, thus pointing to the predominance of price as a determining factor in purchaser decision-making.

Nippon responds that BWAY's testimony is not inconsistent, as it testified that, "[I]n 1998 and 1999 we had a series of delivery and quality disappointments with U.S. mills," not just Weirton. Hr'g Tr., P.R. Doc. 74, Nippon App. Tab 4, at 198.[27] Between 1998 and 1999, BWAY in fact reduced purchases from another producer—[ ] by [ ] tons, and a lower amount—[ ] tons—was shifted to Japanese suppliers in 1999, the only year in which BWAY purchased from Japanese subject importers. In the

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[26] Specifically, the Commission indicated that BWAY [ ].

[27] BWAY's questionnaire response [ ].

same year, purchases from domestic suppliers also increased and purchases from non-subject importers were double that of the subject imports. Thus, it is not inconsistent that BWAY increased purchases from Weirton notwithstanding quality and delivery problems, given that it was also experiencing similar problems with another domestic producer from which BWAY reduced its purchase volume.

2. Crown

The Commission noted on remand that Crown's questionnaire response attributed its increased purchases of subject imports in 1999 to quality- and performance-driven West Coast shortage of supply from two domestic suppliers.[28] Redetermination at 35. The Commission found Crown's stated quality concerns to be inconsistent because Crown's data showed that it had directed significant volume requirements to markedly *lower-priced* TCCSS from Japan, beginning in 1999, and that it in fact qualified a particular domestic producer—[ ]—and sourced TCCSS from [ ] U.S. mills in 1999. The Commission indicated that it would expect to see *higher* prices paid to Japanese producers where superior quality was the supposed predominant factor behind Crown's purchase decisions.

Nippon responds that the Commission's focus on the lower prices of subject imports sidesteps Crown's explanation of its problems with the two West Coast suppliers, and that the data supports such explanation.[29] Either a showing of adequate West Coast supply of quality TCCSS, or a showing of East Coast suppliers willing to fill the void would provide sufficient evidence of inconsistency in Crown's testimony. The court finds that the Commission has failed to provide any specific evidence that would contradict Crown's explanation for its shift to Japanese sources. The fact that Japanese prices were generally lower than domestic prices does not negate the verifiable claims of quality and performance concerns with West Coast suppliers.

Furthermore, Crown's qualification of a particular producer—[ ]—is not necessarily inconsistent with its stated quality concerns, since a supplier's drop in performance may not be of such an extent as to entirely preclude it from being a qualified source of supply. In addition, Crown's significant increase of its purchases of TCCSS from the particular producer in both 1999 and 2000 is not necessarily inconsistent with its quality concerns, as Crown in fact significantly reduced its purchases from two other domestic suppliers—[ ] and [ ]—with quality concerns that may have been more extensive. Under the unique facts of this case there is no support for the Commission's assumption that if domestic producers switch from lower quality producers, they would not be expected to pay lower prices. The Commission does not provide substantial evidence to discount the purchaser testimony that quality and

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[28] The Commission specified that Crown attributed the shift to Japanese sources to [ ]

[29] Nippon indicates that Crown's data show a decrease in purchases from [ ] of [ ] tons corresponds to a [ ] ton increase in purchases from subject importers.

on-time considerations in a certain geographic area were the dominant factors in its purchasing decisions.

3. Silgan

The Commission found that Silgan described its purchases of subject imports as being primarily for specialized applications that are either not available from a U.S. producer or of a quality level not obtainable from a U.S. producer. Redetermination at 36. Silgan attributed its increase in purchases of TCCSS from Japan as a result of its acquisition of Campbell's Soup, which used small quantities of TCCSS produced by Nippon because of its superior quality and according to certain unique specifications not available from U.S. domestic producers. *Id.* The Commission also cited Silgan's testimony that it terminated Weirton as a supplier for failing to meet Silgan's quality and service requirements. Finally, Silgan stated that if it were to purchase according to price, it would purchase from Brazil, Korea and Taiwan.

The Commission found Silgan's testimony inconsistent because most of Silgan's specialized purchases could in fact be made from U.S. producers. It acknowledged that most of the increase in Silgan's purchases was attributable to its acquisition of Campbell's, but it asserts that [ ]. The Commission also acknowledges that Silgan [ ] and [ ], but discounted this evidence because Silgan [ ] its purchases of Japanese subject imports. Finally, the Commission states that deciding not to purchase from Brazil, Korea, and Taiwan reflects its priority rankings where [ ].

Nippon argues that the Commission ignores the extent of the quality concerns documented by Silgan in its dealings with [ ] and other U.S. mills. The court agrees that Silgan's testimony is entirely consistent with the evidence relating to its quality problems. On remand, the Commission has made no further effort to determine whether the extensive quality concerns with domestic producers were not the reason Silgan increased subject imports. Furthermore, the Commission acknowledges that the acquisition of Campbell's was the predominant factor in the increase in subject import prices paid by Silgan, but does not explain why it finds inconsistent Silgan's explanations for not shifting its purchases to domestic TCCSS producers when Silgan testified they are perceived to be of inferior quality. The Commission is correct to perceive that Silgan's priorities appear to be [ ], in that order, but fails to recognize that the same ranking of priorities explains why Silgan chose not to purchase from Brazil, Korea, and Taiwan, and explains why Silgan would shift its purchases toward subject imports. The Commission fails to cite substantial evidence indicating that Silgan's predominant purchasing decision was not based on its stated quality and on-time performance concerns.

4. U.S. Can

U.S. Can had testified that delivery time and quality reasons were the two reasons U.S. Can reduced its volume from a particular producer—[ ]. On remand, the Commission conceded that it erred in finding Mr. Yurco's testimony to be inconsistent in its prior determination. The

Commission maintained, however, that U.S. Can's stated concerns about ontime delivery and quality, and its desire to source globally were not supported by the record. The Commission based its conclusion on a domestic producer's—[ ]—records showing that on-time performance rates did not drop below contractual levels for sourcing from another supplier until late in the POI, that is [ ]. Further, the Commission found that U.S. Can documents discuss quality issues only after volume was reduced from the particular domestic producer.[30]

First, simply because performance rates prior to 1999 were not yet so poor that they were grounds for sourcing from another supplier does not mean that performance was not a concern. Second, U.S. Can's internal documents indicate that quality problems persisted with the domestic producer "for a long period of time," a fact that is not negated by statements in the same document that the problems had improved over this time. Thus, contrary to the Commission's conclusion, the evidence indicates that the producer had a track record of quality problems in supplying U.S. Can and consistently failed to meet delivery time, such that the Commission's rejection of U.S. Can's testimony regarding volume reductions is not well-founded.

B. Non-Subject Imports

On remand, the Commission was required to examine whether non-subject import volume and pricing did not constitute the predominant source of injury sufficient to sever the link to causation by subject imports in light of the conditions of competition, particularly regional distribution of shipments.

1. Volume

The court in *Nippon I* instructed the Commission to address Nippon's concern that non-subject imports were predominant in the regions where the majority of domestic shipments were concentrated. 182 F. Supp. 2d at 1354–55. On remand, the Commission indicated that the record showed that: (1) the financial performance of U.S. mills primarily competing on the West Coast "mirrored" the poor performance of domestic mills competing on the East Coast; (2) the rapid increase in subject imports entered both regions at comparable levels; and (3) subject import pricing was aggressive across the country.

Specifically, the Commission presented evidence of poor performance by a particular producer—[ ]—which sells [ ] percent of its shipments on the West Coast. Specifically, from 1997 to 1999, this producer experienced a significant drop in operating income, net sales in terms of value and volume, and gross profits. Simply noting the declining performance of West Coast TCCSS producers is not sufficient to establish that subject imports were not precluded from being the source of that harm. To find subject imports a material cause, even on the West Coast where non-subject imports were not the predominant imports, the Commission needed to determine whether there is a *correlation* between the suppos-

[30] The Commission also states that there was a [ ].

edly declining U.S. mills' West Coast revenues, specific instances of underbidding by producers of subject imports, and a subsequent shift in volume to those subject imports. The Commission's assertion that subject import volume increased in comparable amounts on the West Coast and East Coast, without specific supporting evidence, such as an increase in volume that correlates in some way to instances of subject import underbidding, does not meet this requirement, nor does the Commission's assertion that subject importers bid aggressively industry wide.

2. Non-subject Import Pricing

On remand, the Commission was first required to reassess non-subject underselling by either providing further explanation for how it divided non-subject importers into "countries that are sources of high-quality TCCSS" and "those whose principal sales advantages are favorable prices and/or discounts," or grouping non-subject importers in one set for comparison to bids made by subject importers. *Nippon I,* 182 F. Supp. 2d at 1355–56. The Commission responded by providing Table TCCSS–4 comparing final bids submitted by suppliers of subject imports versus final bids by suppliers of non-subject imports. The Commission found a marked reversal in terms of pricing in the marketplace. Whereas in 1997–98 final bids submitted by subject import suppliers were higher than final bids from non-subject import suppliers, in 1999–00 the subject importers overbid less than one half of the time.

It is unclear why the Commission chose to analyze this chart in two year increments when there is only one recorded instance in 2000 where subject and non-subject importers made final bids for the same purchaser. The Commission omits that a year-to-year trend analysis indicates that there is no clear pattern to the bidding relationship of subject and non-subject importers, and certainly not a marked reversal in terms of pricing in the marketplace. In 1997, non-subject importers underbid subject importers twice and overbid twice. In 1998, non-subject underbidding increased to six instances, while overbidding decreased to three instances. Finally in 1999, non-subject underbidding retreated to four instances, while overbidding increased to three.

The Commission was also required to construct a table comparing Japanese prices directly to non-subject prices. The Commission submitted Table TCCSS 5 and 6 comparing actual weighted average prices and discount rates for subject imports and non-subject imports. Once again it found a marked reversal in terms of pricing in the marketplace, finding a trend from higher Japanese prices (and lower discount rates) to lower Japanese prices (and higher discount rates). Once again the Commission's analysis of the data is misleading. By collapsing data for the years 1997–98, the Commission masks the similarity between the years 1997 and 1999. In 1997 there were two instances of non-subject underbidding of Japanese imports and one instance of Japanese underbidding. In 1999, there were two instances of non-subject underbidding, one instance of Japanese underbidding, and one instance where bids

were the same. In 1998, the numbers are the same as 1999, except there is one additional instance of non-subject underbidding. Contrary to the Commission's assertion, there is no evidence to support a finding of a marked reversal in terms of pricing in the marketplace.

The Commission has inadequately responded to the court's concerns regarding whether non-subject imports were the predominant cause of harm to the domestic TCCSS industry, so as to undermine the finding of harm by subject imports.[31]

CONCLUSION

The record reflects that the increased subject import volume must be attributed largely to purchaser priorities that are unrelated to price. Purchasers began sourcing more merchandise from subject importers because of poor performance and quality issues with domestic producers. Further, few domestic producers ship to the West, where the majority of imports from Japan are sold. The record also reflects that the market conditions were such that the effect of subject imports on domestic prices did not cause material harm. Purchasers reported that they conduct their price negotiations with domestic suppliers first, and then conduct negotiations with importers to meet additional needs. Annual contracts, setting a fixed price and volume targets, require domestic producers to meet only other domestic prices, and there is no evidence that purchasers shifted volume after signing the contracts to lower priced subject imports. Lower Japanese prices reflect that the domestic industry is able to charge a price premium for its leadtime delivery advantage over subject importers. Lastly, throughout the POI non-subject importers held a larger market share than subject importers from Japan, and an even larger market share on the East Coast, where domestic suppliers are concentrated.

As the Commission's concessions and uncontested evidence lead inexorably to the conclusion that lower priced subject imports did not have a material effect on domestic prices, and in the absence of any valid reason to discount non-price factors or non-subject imports as the predominant cause of material injury, the court remands with instructions for the Commission to revoke the antidumping duty order. Remand for reconsideration or recalculation is not necessary in this case, as not only are the Commission's conclusions unsupported by substantial evidence, it has also demonstrated an unwillingness or inability to address the substantial claims made by respondents or the concerns expressed by the court in *Nippon I,* leaving the only reasonable conclusion from the evidence on the record to be that subject imports were not a material cause of injury to the domestic TCCSS industry.[32] The Commission's determination is vacated and the Commission is directed to enter a negative determination.

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[31] The court acknowledges that there may be more than one sufficient cause of material injury. The question is whether the evidentiary links for causation of material injury by subject imports are severed.

[32] Because neither Defendant nor Defendant-Intervenor has suggested threat of material injury as an alternative basis for an affirmative injury finding the court declines to remand for consideration of threat.

(Slip Op. 02–87)

CORUS GROUP PLC, CORUS UK LTD., CORUS STAAL BV, CORUS PACKAGING PLUS NORWAY AS, CORUS STEEL USA INC., AND CORUS AMERICA INC., PLAINTIFFS *v.* GEORGE W. BUSH, PRESIDENT OF THE UNITED STATES, ROBERT C. BONNER, COMMISSIONER, U.S. CUSTOMS SERVICE, AND U.S. INTERNATIONAL TRADE COMMISSION, DEFENDANTS, AND WEIRTON STEEL CORP., DEFENDANT-INTERVENOR, AND BETHLEHEM STEEL CORP., NATIONAL STEEL CORP. AND U.S. STEEL CORP., DEFENDANT-INTERVENORS

Court No. 02–00253

[Motion for preliminary injunction denied. Partial summary judgment for defendants.]

(Dated August 9, 2002)

Steptoe & Johnson LLP (Richard O. Cunningham, Peter Lichtenbaum, and *Arun Venkataraman)* for plaintiffs.

Robert D. McCallum, Jr., Assistant Attorney General, *David M. Cohen,* Director, *Lucius B. Lau,* Assistant Director, Commercial Litigation Branch, Civil Division, United States Department of Justice, for defendants George W. Bush, President of the United States, and Robert C. Bonner, Commissioner, United States Customs Service.

Lyn M. Schlitt, General Counsel, *James M. Lyons,* Deputy General Counsel, United States International Trade Commission *(Mary Elizabeth Jones* and *Mark B. Rees),* for defendant United States International Trade Commission.

Schagrin and Associates (Roger B. Schagrin) for defendant-intervenor Weirton Steel Corporation.

Skadden, Arps, Slate, Meagher, & Flom LLP (Robert E. Lighthizer, John J. Mangan, James C. Hecht) for defendant-intervenors Bethlehem Steel Corporation, National Steel Corporation, and United States Steel Corporation.

OPINION

RESTANI, *Judge:* This matter is before the court on Plaintiffs' motion for preliminary injunctive relief pursuant to USCIT R. 65(a). Plaintiffs Corus Group PLC, Corus UK Ltd., Corus Staal BV, Corus Packaging Plus Norway AS, Corus Steel USA Inc., and Corus America Inc. (collectively "Corus") seek preliminary injunctive relief to enjoin Defendant United States Customs Service ("Customs") from (1) collecting additional duties imposed on Plaintiffs' tin mill product imports, as of March 20, 2002, pursuant to the President's March 5, 2002 Steel Products Proclamation; (2) liquidating any and all unliquidated entries of Plaintiffs' tin mill products that have entered and will continue to enter the United States; and (3) taking any other action regarding Plaintiffs' tin mill products. The International Trade Commission ("ITC" or "Commission") moves to dismiss for lack of jurisdiction pursuant to USCIT R. 12(b)(2) and for failure to state a claim pursuant to USCIT R. 12(b)(5). Defendants George W. Bush, President of the United States, and Robert C. Bonner, Customs Commissioner (collectively the "Administration") filed a separate motion to dismiss for failure to state a claim or, in the

alternative, a Rule 56 motion for summary judgment.[1] Corus filed a cross-motion for summary judgment.

BACKGROUND

On March 7, 2002, the President of the United States issued a proclamation pursuant to Section 201, *et seq.*, of the Trade Act of 1974 ("Act"). *Proclamation No. 7529—To Facilitate Positive Adjustment to Competition From Imports of Certain Steel Products,* 67 Fed. Reg. 10553 (March 7, 2002) *("§201 Proclamation").* The President imposed safeguard measures to counteract serious injury, or the threat of serious injury, found by the ITC. With respect to certain tin mill products, the President imposed an *ad valorem* duty increase of thirty (30) percent for the first year of the § 201 remedies.[2] Corus is, among other things, a foreign producer of tin mill products.

Corus challenges the invocation of § 201 safeguard provisions on three grounds: (1) that the ITC votes supporting an affirmative injury determination were improperly counted with respect to tin mill products ("Count I"); (2) that Commissioner Dennis M. Devaney was not a legal member of the ITC at the time of his vote because there was not an ITC vacancy at the time of his appointment ("Count II"); and (3) that Commissioner Devaney was not a legal member of the ITC at the time of his vote because he was not lawfully appointed by then President William Jefferson Clinton ("Count III"). Corus seeks a preliminary injunction to enjoin enforcement of the resulting duty increase and to prevent liquidation of all present and future unliquidated entries of Corus's tin mill products. Defendants collectively oppose injunctive relief.

For the purposes of this opinion, the court has consolidated Plaintiffs' Motion for Preliminary Judgment with the ITC's motion to dismiss for lack of jurisdiction and Count I on the merits (ITC's method of counting votes).

DISCUSSION

I. Jurisdiction

As an initial matter, the ITC moves to dismiss on grounds that the court lacks jurisdiction to review Counts II and III.[3] Section 1581(i) provides in relevant part that the court:

> shall have exclusive jurisdiction of any civil action commenced against the United States, its agencies, or its officers, that arises out of any law of the United States providing for—
>
> * * * * * * *
>
> (2) tariffs, duties, fees, or other taxes on the importation of merchandise for reasons other than the raising of revenue.
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> * * * * * * *

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[1] The ITC concurs in the alternative motion for summary judgment filed by the Administration. ITC Br. at 27.

[2] Duties decrease over the final two years of the remedial period. *§201 Proclamation* at ¶ 9(b).

[3] The ITC concedes jurisdiction as to Count I. The Administration does not dispute jurisdiction under any count.

> (4) administration and enforcement with respect to the matters referred to in paragraphs (1)–(3) of this subsection and subsections (a)–(h) of this section.

28 U.S.C. § 1581(i) (2000). The ITC argues that the issue of whether Commissioner Devaney was properly appointed involves questions of Presidential power and, therefore, falls outside the jurisdiction of the court.[4] The Commission's position ignores the fact that this claim arises in the context of a suit challenging the imposition of tariffs.[5] Plaintiffs' claim that § 201 safeguards are invalid because of an improperly seated Commissioner clearly raises issues regarding whether the ITC properly carried out the laws providing for tariffs, duties, fees, or other taxes on the importation of merchandise and whether such laws are properly administered. Accordingly, the court has jurisdiction pursuant to 28 U.S.C. § 1581(i).

II. ITC's Method of Counting Votes

Corus argues that, although the ITC presented an "equally divided" affirmative injury determination to the President, the ITC vote was neither affirmative nor divided with respect to tin mill products. Under Section 202(b) of the Act, the Commission must determine "whether an article is being imported into the United States in such increased quantities as to be a substantial cause of serious injury, or the threat thereof, to the domestic industry producing an article like or directly competitive with the imported article." 19 U.S.C. § 2252(b)(1)(A) (2000).[6] In order to render its injury determination, the Commission undertakes an investigation upon the filing of: (1) a domestic injury petition; (2) an executive branch referral; (3) a resolution of either the Committee on Ways and Means of the House of Representatives or the Committee on Finance of the Senate; or (4) on its own motion. *Id.* In this case, both the United States Trade Representative and Senate Committee on Finance requested an investigation of certain steel products.[7] *USTR Request to Initiate Section 202 Investigation,* (June 22, 2001), http://www.usitc.gov/steel/ER0622Y1.pdf (last visited August 9, 2002); *Resolution directing the International Trade Commission to make an investigation into certain steel imports under section 201 of the Trade Act of 1974* (July 26, 2001), http://www.senate.gov/~finance/steelresolution.pdf (last visited August 9, 2002).

Six Commissioners participated in the underlying investigation at issue here. Commissioners Koplan, Okun, Hillman, and Miller deter-

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[4] Although the court is not bound by the decision of a co-equal court, another judge of the court has already determined that review of Commissioner Devaney's status is appropriate under § 1581(i). *Nippon Steel Corp. v. United States,* Slip Op. 01–153 (Ct. Int'l Trade Dec. 28, 2001) (challenge to ITC sunset review injury determination).

[5] The ITC argues that, because most of the discovery in *Nippon* involved White House documents, the court should acknowledge that the subject matter does not involve matters regarding international trade. The court finds the ITC's argument relying on the location of documents unpersuasive.

[6] For the purposes of this action, Plaintiffs do not challenge the role of the Commission or its factual determinations. Plaintiffs do not challenge the exercise of discretion granted to the President.

[7] The steel products covered by the request included: (1) certain carbon and alloy flat products; (2) certain carbon and alloy long products; (3) certain carbon and alloy pipe and tube products; and (4) certain stainless steel and alloy tool steel products. *USTR Request* at Attachment I. The specific products and exceptions identified are numerous and can be found within the request. The tin mill products at issue here fall within HTS subheadings 9903.73.37 through 9903.73.39.

mined that the U.S. tin mill producers constitute the industry producing articles "like or directly competitive with the imported article, tin mill steel." *Steel,* Inv. No. TA–201–73, USITC Pub. 3479 Vol. I, at 48–49 & 71 n.367 (Dec. 2001) (hereinafter *"Determination").* Of these four, only Commissioner Miller determined that imports of tin mill products caused serious injury to the U.S. tin mill industry. *Id.* at 74 & n.402.

Two Commissioners adopted a broader definition of the domestic industry and the like product corresponding to the subject imported merchandise. Commissioner Bragg identified the domestic industry as U.S. producers of carbon and alloy flat products. *Id.* at 272–73. Commissioner Devaney identified the domestic industry as U.S. producers of flat-rolled steel products. *Id.* at 36 n.65 & 45 n.137. Tin mill products are a sub-set of the larger product categories identified by Commissioners Bragg and Devaney. *See ITC Staff Report,* Vol. II, Tables FLAT–3 & FLAT 10. Both Commissioners found that imports of products in larger categories caused serious injury to the domestic industry.

The Commission combined the affirmative votes of Commissioners Bragg and Devaney on the broader categories with that of Commissioner Miller on tin mill products and, pursuant to 19 U.S.C. § 2252(f), reported to the President that it was "equally divided" with respect to tin mill products.[8] *Determination* at 1 n.1. 19 U.S.C. § 1330(d)(1) provides that the President may consider an equally divided vote of the Commission to be either an affirmative determination or a negative determination.[9] The President elected to adopt the affirmative injury determination, *§ 201 Proclamation* at ¶ 4, and, pursuant to § 2253(a)(1)(A),[10] granted relief to the domestic tin mill industry in the form of an initial additional 30% tariff on tin mill imports. *See § 201 Proclamation* at ¶ 9(b). Corus argues that the affirmative votes of Commissioners Bragg and Devaney should not have been counted towards the tin mill injury determination because neither Commissioner specifically analyzed tin mill products. Corus argues that the aggregation of Commissioners Bragg and Devaney constitutes a "fundamental misconstruction of the Section 201 statute" employed by the ITC, accepted by the President, and carried out by Customs. Corus argues that, had the votes of Commissioners Bragg and Devaney been properly discarded with respect to tin mill products, the Commission vote would have been

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[8] The Commission explained its determination as follows:

> Chairman Koplan, Vice Chairman Okun, and Commissioner Hillman determine that carbon and alloy tin mill products are not being imported into the United States in such increased quantities as to be a substantial cause of serious injury; Commissioners Bragg, Miller, and Devaney make an affirmative determination regarding imports of carbon and alloy tin products.

Determination at 25.

[9] 19 U.S.C. § 1330(d)(1) provides, in relevant part, that:

> In a proceeding in which the Commission is required to determine * * * under [section 2252 of this title,] whether increased imports of an article are a substantial cause of serious injury, or the threat thereof, as described in subsection (b)(1) of that section (hereafter in this subsection referred to as "serious injury") * * * and the commissioners voting are *equally divided* with respect to such determination, then the determination agreed upon by either group of commissioners may be considered by the President as the determination of the Commission."

Id. (emphasis added).

[10] Upon receiving a report from the Commission containing an affirmative injury determination, the President is directed to take all appropriate and feasible action within his power to facilitate efforts by the domestic industry to make a positive adjustment to import competition and provide greater economic and social benefits than costs. 19 U.S.C. § 2253(a)(1)(A).

3–1 in the negative, thereby precluding the imposition of § 201 tariffs on tin mill products.

Because the Act vests the President and ITC with "very broad discretion" and does not specifically provide for judicial review, the court's review is extremely limited. *Maple Leaf Fish Co., v. United States,* 762 F.2d 86, 89 (Fed. Cir. 1985).

> In international trade controversies of this highly discretionary kind—involving the President and foreign affairs—this court and its predecessors have often reiterated the very limited role of reviewing courts. *See, e.g., American Association of Exporters and Importers v. United States,* 751 F.2d 1239, 1248–49 (Fed. Cir. 1985); *Florsheim Shoe Co. v. United States,* 744 F.2d 787, 793, 795–97 (Fed. Cir. 1984). For a court to interpose, there has to be a clear misconstruction of the governing statute, a significant procedural violation, or action outside delegated authority.

Id. There is no statutory or regulatory provision enumerating how the Commission should count its vote, and this manner of counting votes does not appear to conflict with the overall § 201 scheme. The court, therefore, cannot find that there has been a clear misconstruction of the statute or a significant procedural violation.

In the alternative, Corus asks the court to construe the absence of such a provision as a limitation—i.e., that for the ITC to count its votes in this manner would be to act outside the statutory authority granted by Congress. The Federal Circuit has already determined that Congress granted the ITC broad authority to reach its determination. "The same factors which have led, in this kind of discretionary case, to strict confinement of the court's intervention *vis-a-vis* the President are equally applicable to the ITC in its 'escape clause' functioning." *Id.* at 89–90. Under the statute, the Commission is required to render an injury determination and transmit that determination to the President. Congress imposed no qualifications upon the ITC's authority in this respect.

Moreover, it is clear that the Commissioners considered tin mill products in their analysis. Commissioner Bragg found as follows: "I determine that certain steel products are being imported in such increased quantities as to be a substantial cause of serious injury to the domestic industries producing: (1) carbon and alloy flat products (including slab, hot-rolled sheet and strip, corrosion resistant, grain oriented electrical steel, and tin mill products.)" *Determination* at 269 (separate views on injury of Commissioner Lynn M. Bragg). Commissioner Devaney defined the domestic industry "appl[ying] the same basic analysis as the majority. However, he finds a single like product consisting of all flat products." *Determination* at 36 n.65. Commissioner Devaney expressly stated that his findings should be applied to the more narrow categories determined by the majority. "Commissioner Devaney joins in the analysis of the majority, related to injury, as presented here. He further finds that if the analysis is performed over the entire industry as he has defined it, the result is the same, i.e., the industry is seriously injured." *Determination* at 52 n.186; *see also* Determination at 58 n.224 (same

regarding causation). Thus, both commissioners made affirmative injury and causation findings with respect to tin mill products because, in their analyses, these products are included in the larger category of carbon and alloy flat products.

The court finds that the Commission's method of counting votes is not a clear misconstruction of the governing statute, a significant procedural violation, or action outside the scope of the ITC's delegated authority.

III. Preliminary Injunction

Pursuant to USCIT R. 65(a), Corus seeks a preliminary injunction to enjoin Customs from collecting additional duties on its tin mill products or liquidating its entries. A preliminary injunction is an extraordinary remedy which may issue only upon a clear showing by the moving party that it is entitled to such relief. *See Trent Tube Div., Crucible Materials Corp. v. United States,* 14 CIT 587, 744 F. Supp. 1177 (1990). In order to obtain a preliminary injunction, Corus must demonstrate that: (1) without a preliminary injunction, Corus will suffer immediate irreparable harm; (2) there is likelihood of success on the merits; (3) the public interest would be better served by the requested relief; and (4) the balance of hardship on all the parties favors plaintiffs. *See Zenith Radio Corp. v. United States,* 710 F.2d 806, 809 (Fed. Cir. 1983).

In reviewing the factors, the court employs a "sliding scale." *Chilean Nitrate Corp. v. United States,* 11 CIT 538, 539 (1987). Consequently, the factors do not necessarily carry equal weight. *FMC Corp. v. United States,* 3 F.3d 424, 427 ("If a preliminary injunction is granted by the trial court, the weakness of the showing regarding one factor may be overborne by the strength of the others. * * * [Conversely], the absence of an adequate showing with regard to any one factor may be sufficient, given the weight or lack of it assigned the other factors, to justify [its] denial."). The crucial factor is irreparable injury. *Elkem Metals Co. v. United States,* 135 F. Supp. 2d 1324, 1329 (Ct. Int'l Trade 2001); *Nat'l Hand Tool Corp. v. United States,* 14 CIT 61, 65 (1990) ("[t]he critical question * * * is whether denial of the requested relief will expose the applicant to irreparable harm."). "Failure of an applicant to bear its burden of persuasion on irreparable harm is ground to deny a preliminary injunction, and the court need not conclusively determine the other criteria." *Bomont Indus. v. United States,* 10 CIT 431, 437, 638 F.Supp. 1334, 1340 (1986); *see also Chilean Nitrate Corp.,* 11 CIT at 539 (denying preliminary injunction solely on grounds that moving party failed to establish irreparable harm).

A. Irreparable Harm

1. Collection

Corus first argues that, without preliminary injunctive relief, it will be forced to close its Bergen, Norway plant. Generally, where a party is required to fundamentally alter its business operations during litigation in order to comply with a challenged Government action, that party suffers irreparable harm. *See, e.g., CPC Int'l v. United States,* 19 CIT

978, 979–81, 896 F. Supp. 1240, 1243–45 (1995); *Am. Frozen Food Inst. v. United States,* 18 CIT 565, 570, 855 F. Supp. 388, 393–94 (1994).

Corus contends that its Bergen, Norway plant is uniquely dependent upon U.S. tin mill sales revenues to meet its operating costs. Corus argues that it cannot absorb the additional safeguard duties for U.S. sales if it results in the Bergen plant operating at a loss.[11] Corus estimates that the projected losses for 2002 will be approximately [ ]. Plaintiffs do not expressly attribute the entire loss to the impact of the safeguard provision but implies so by projecting that future litigation without a preliminary injunction will result in similar losses in 2003 and 2004. Corus contends that the Bergen plant cannot be modified to produce other products. Corus argues that operating losses resulting from the safeguard provision will force it to permanently close the Bergen plant, costing 279 jobs. Corus argues that closing the Bergen the plant will have a significant and irreversible adverse impact upon its business operations.

There is no bright line test for determining irreparable harm. Defendants argue that mere economic injury is insufficient. *See, e.g., Neenah Foundry Co. v. United States,* 86 F. Supp. 2d 1308, 1313 (Ct. Int'l Trade 2000). Defendants point out that, in previous cases, Plaintiffs' burden has been met by parties demonstrating that they will go out of business in the absence of injunctive relief. Citing *Queen's Flowers de Colombia v. United States,* 20 CIT 1122, 125, 947 F. Supp. 503, 506 (Ct. Int'l Trade 1996); *Am. Air Parcel Forwarding Co., v. United States,* 4 CIT 94, 98 (1982). Contrary to Defendants' implication, there is no requirement that a party seeking injunctive relief establish imminent failure. Although Corus need not establish that it is on the verge of bankruptcy, Plaintiffs nevertheless bear an "extremely heavy burden." *Shandong Huarong General Group Corp. v. United States,* 122 F. Supp. 2d. 1367, 1369 (Ct. Int'l Trade 2000).

At oral argument, Corus presented two witnesses, Richard Maxwell, Finance Controller and Director of Corus Packaging Plus Norway AS ("CPP Norway"), and Stig Hauge, Managing Director, CPP Norway. Both testified as to the present standing of Corus, and CPP Norway in particular, after the implementation of § 201 tariffs. The crux of the testimony suggested that CPP Norway, a separate legal entity from the other Corus affiliates, could not independently absorb the § 201 tariffs.[12] Both witnesses testified that the Bergen plant is uniquely dependent upon U.S. sales revenues to meet its operating costs. Both testified that the Norway factory was not sufficiently profitable to attract investment for upgrades that might allow it to produce articles other than tin mill products. Both witnesses testified that, as a result, the Bergen plant

[11] Corus argues that, because the U.S. tin mill market is subject to a "high degree of price sensitivity", Corus cannot raise the prices of its merchandise in the United States. Citing *Affidavit of Jean-Paul Meijer* (Financial Controller of Corus Packaging Plus Norway AS), ¶ 2.

[12] Corus America Inc. is the importing arm of Corus. It actually pays the tariff and then charges that fee back to Corus. It is unclear which affiliate is ultimately charged with paying the tariff, but for the purposes of this argument, the court assumes the cost is charged to CPP Norway. Plaintiffs conceded at oral argument that they could show irreparable harm from duty collection only as to entries from CPP Norway, the owner of the Bergen plant.

would have to raise prices or absorb the tariffs. The witnesses testified that their customers had already indicated they would seek alternative suppliers should CPP Norway raise its prices. The witnesses testified that CPP Norway has only a few customers and that a long-term separation would likely sever those business relationships. The only alternative available, Corus argues, would be to absorb the tariffs. The witnesses testified that CPP Norway would operate at a loss if it were forced to absorb the tariffs. Corus argues that sound business principles would require it to close the plant rather than operate at a loss. In short, although it has not made concrete plans to do so at any particular time, Corus argues that the effects of the § 201 safeguards will force it to close the Bergen, Norway plant.

Every increase in duty rate will necessarily have an adverse affect on foreign producers and importers. That is particularly true with regards to the 30 % increase imposed under the safeguard provision. If the court were to find irreparable harm under these facts, the court would likely be required to do so in any challenge to a duty increase because every plaintiff could argue that increased tariffs would cause revenue shortfalls possibly resulting in either operating at a loss or plant closure at some future date. On balance, Corus has shown that it may suffer an adverse economic impact, but to find irreparable harm here would effectively create a *per se* irreparable harm rule in similar challenges—a result likely contrary to the extraordinary nature of the remedy. *Am. Spring Wire Corp. v. United States,* 7 CIT 2, 6, 578 F.Supp. 1405, 1408 (1984).

The court finds that Corus has not provided sufficient evidence that the Bergen plant is in danger of imminent closure. At best, Corus has suggested that CPP Norway cannot sustain the damage caused by § 201 tariffs over a long period of time. The court anticipates that it will issue its final decision on Counts II and III within a few months if not weeks. While Corus has arguably presented evidence of economic injury, that is insufficient. *See S.J. Stiles Ass. v. Snyder,* 646 F.2d 522, 525 (C.C.P.A. 1981) ("A preliminary injunction will not issue simply to prevent a mere possibility of injury, even where prospective injury is great."). Accordingly, there is little chance of irreparable harm in advance of a final court ruling.

2. Liquidation

Corus seeks to enjoin liquidation on grounds that, because neither the statute nor governing regulations authorize a reliquidation or refund, Corus will be denied effective and meaningful judicial review. Corus argues that, even if it succeeds on the merits, it will be unable to recover any excessive duties paid on entries in the past or interim and, therefore, will be irreparably harmed. Denial of effective and meaningful judicial review as a result of a court's refusal to grant a preliminary injunction can constitute irreparable harm. *See Zenith Radio Corp. v. United States,* 710 F.2d 806, 810 (Fed. Cir. 1983); *NMB Sing. Ltd. v. United States,* 120 F. Supp. 2d 1135, 1139–40 (Ct. Int'l Trade 2000).

According to counsel for the Administration, Customs normally liquidates entries on a 314-day cycle from the date of entry. *Def.s' Response to the Court's Inquiry Concerning Liquidation of Entries Subject to the President's 201 Proclamation,* at 2 (dated August 5, 2002). A steel entry filed on March 20, 2002, the effective date of the § 201 remedy, would normally liquidate on or about January 30, 2003. Liquidation of a steel product entry covered by an antidumping or countervailing duty order may take substantially longer because that entry is automatically suspended until Customs receives liquidation instructions from the Department of Commerce. Plaintiffs allege that their entries are not currently suspended. The court realizes that there are no guarantees on when liquidation will occur, but, as discussed, the court intends to resolve the matter quickly therefore harm from liquidation is not likely. Moreover, the parties have not explained why 28 U.S.C. § 1581(i) would not provide a post-liquidation remedy.[13] The absence of a statutory refund process would not seem to be a bar to relief as the court may fashion equitable remedies. Thus, liquidation also appears an unlikely cause of irreparable harm here.

B. Public Interest

Congress has expressly entrusted the issuance of safeguard measures to the President of the United States. *Maple Leaf Fish Co.,* 762 F.2d at 89. Revocation of a Presidential mandate prior to a final determination that it violates the law would seem to be counter to the public interest. The public interest is also served by ensuring that government officials are appointed in a constitutional manner and in accordance with Congressional intent, and that trade laws are administered properly. *See, e.g., Ugine-Savoie Imphy v. United States,* 121 F. Supp. 2d 684, 690 (Ct. Int'l Trade 2000). The court cannot reasonably quantify these interests for comparison separately from the likelihood of success on the merits and, instead, finds that this factor favors neither side.

C. Balance of Hardship

Corus argues that the Government and domestic industry will suffer only negligible harm should a preliminary injunction be granted. That position is counter to the determinations at the core of this matter—that a tariff increase is necessary to counter-act serious injury or the threat of serious injury as determined by Commission and adopted by the President. Defendant-intervenors represent the domestic producers and present contrary affidavits and testimony stating that domestic industry presently suffers from both decreased domestic consumption of tin mill products and, at least prior to the § 201 relief, increasing market share of low-priced subject imports. Defendant-intervenors argue that a preliminary injunction would effectively revoke the § 201 increases causing low-priced imports to flood the market. Defendant intervenor's evidence was weak on the causal relationship be-

[13] The parties seem to have focused on on 28 U.S.C. § 1581(a) which provides protest denial review of decisions of the Secretary of Treasury, not the President or ITC.

tween imports and injury, but the Commission's affirmative injury determination itself would appear to be some support for the domestic industry's hardship claim.[14] Further, defendant-intervenors provided some evidence that imposition of the § 201 relief has provided opportunities to improve their liquidity, which could be lost if § 201 duties were not collected.

Corus too has submitted some evidence of hardship. *See* discussion *supra* § III, A, 1. While the economic injury suffered by Corus under the § 201 safeguard provisions may be insufficient to establish the requisite irreparable harm, the court finds it persuasive to support hardship. On balance, the court finds that both parties likely have shown some hardship and cannot conclude at this point that injury suffered by one in the absence of § 201 safeguards outweighs injury suffered by the other in their presence.

D. Likelihood of Success on Merits

As discussed, *supra* § III, the court analyzes the four preliminary injunction factors on a sliding scale. Because Corus makes, at best, a weak showing of irreparable harm and does not prevail on either balance of hardship or public policy grounds, Corus must make a heightened showing that it is likely to succeed on the merits. As discussed, *supra* § II, the court finds that the ITC did not act contrary to law in counting the votes of individual Commissioners. Consequently, Corus must demonstrate that it is very likely to succeed on the merits of Counts II and III.[15] Both counts attack the validity of Commissioner Devaney's appointment and his consequent vote on the § 201 safeguards.[16]

1. Count II: Vacancy

Corus first argues that, at the time of Devaney's appointment, there was not a vacancy to be filled. The term of Commissioner Devaney's predecessor, Thelma J. Askey, ended on December 16, 2000. She maintained her position pursuant to 19 U.S.C. § 1330(b)(2) (2000), which authorizes a departing Commissioner to remain in office as a "holdover" "until his successor is appointed and qualified." Corus argues that, because Commissioner Askey had neither resigned nor been removed prior to Commissioner Devaney's putative appointment on January 3, 2001, no vacancy existed on that date for the President to "fill" by recess appointment. Citing *Wilkinson v. Legal Services Corp.*, 865 F.Supp. 891, 900–01 (D.D.C. 1994), *rev'd on other grounds*, 80 F.3d 535 (D.C. Cir. 1996) (construing the Legal Services Corporation Act of 1974, codified at 42 U.S.C. § 2996b, to read that a vacancy does not occur upon the expira-

[14] The court has not been asked to review the Commission's determination for this purpose, and has not done so.

[15] Briefing and argument is not complete on these two counts.

[16] Defendants argue that Counts II and III should be dismissed because Corus did not raise appointment issues before the ITC and, therefore, did not exhaust its administrative remedies. Corus argues that the Commission was aware of the questions surrounding Commissioner Devaney's appointment and to raise them would be futile. In addition, Defendants argue that, even if Commissioner Devaney's appointment was technically flawed, his actions were authorized by the *de facto* officer doctrine. *See Ryder v. United States*, 515 U.S. 171, 180 (1995) ("The *de facto* officer doctrine confers validity upon acts performed by a person acting under the color of official title even though it is later discovered that the legality of that person's appointment or election to office is deficient."). For the purposes of ruling on the preliminary injunction, the court assumes that Plaintiffs' claim would survive these particular challenges.

tion of a term of office but only upon the resignation, death, or removal of a sitting officer); *Mackie v. Clinton,* 827 F. Supp. 56 (D.D.C. 1993), *vacated as moot,* 1994 WL 163761 (D.C. Cir. Mar. 9 1994) (construing the appointment provision of the Postal Reorganization Act of 1970, as codified in 39 U.S.C. § 202(b), to read the same).

Defendants argue that the Act establishes that the end of one Commissioner's term necessarily creates a "vacancy." Section 330(b) of the Act, provides that:

> The term of office of each commissioner appointed after such date shall expire 9 years from the date of the expiration of the term for which his predecessor was appointed, except that—
>
> * * * * * * *
>
> (2) any commissioner may continue to serve as a commissioner after an expiration of his term of office *until his successor is appointed and qualified.*

19 U.S.C. § 1330(b)(2) (emphasis added). Defendants cite *Staebler v. Carter* for the proposition that similar statutory language has been construed to recognize the creation of a vacancy at the time a Commissioner's term expires. 464 F. Supp. 585, 588–90 (D.D.C. 1979) (construing the appointment provision of the Federal Election Campaign Act, as codified in 2 U.S.C. § 437c(a)(2)(B) to read that a vacancy is created upon the expiration of the predecessor's term).

In the primary cases relied upon by the parties, *Staebler, Wilkinson,* and *Mackie,* the district courts struggled with the vacancy issue. The courts recognized that there was little guidance to determine when a vacancy is created. In each case, the court ultimately resorted to a construction of the governing statute. The parties here ask the court to engage in similar statutory construction with respect to the "appointed and qualified" language of the holdover provision. The parties debate whether Commissioner Askey's holdover position terminated upon Devaney's appointment, thus creating a vacancy. In *Swan v. Clinton,* 100 F.3d 973 (D.C. Cir. 1996), the only circuit case on point, the court found that "a more natural reading of 'qualified' [for purposes of similar language in the National Credit Union Administration Act] mean[s] that the requirements for assuming office have been fulfilled, which could be either by nomination with Senate confirmation or *by recess appointment." Id.* at 986 (emphasis added). *Swan* is not binding and may be distinguishable, but it certainly does not assist Plaintiffs. At best, Plaintiffs can establish that the question of whether a vacancy exists under § 1330 is open.[17] As such, Plaintiffs cannot establish that it is very likely to succeed to on this issue.

2. Count III: Recess Appointment

The President is constitutionally empowered "to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commis-

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[17] The court notes that the issue of whether a vacancy existed at the time of Commissioner Devaney's appointment is presently under review for final, not preliminary, resolution in *Nippon Steel Corp. v. United States,* Court No. 01–00103 (Ct. Int'l Trade) (J. Eaton) *("Nippon* 01–00103").

sions which shall expire at the End of their next Session." U.S. Const. art. II, § 2, cl. 3. Under the recess appointment clause, the President may appoint officers without the normally requisite advice and consent of the Senate. U.S. Const. art. II, § 2, cl. 2. On December 15, 2000, the Senate and House adjourned *sine die.* On December 16, 2000, Commissioner Askey's term as Commissioner of the ITC expired. On the morning of January 3, 2001, a recess appointment order was prepared and executed by the White House Executive Clerk's office appointing Mr. Devaney as a Commissioner to the ITC. The Senate reconvened at 12:01 p.m. on the same day. It is important to note that Plaintiffs did not object to Defendants' statement of material fact that the order was executed before the Senate reconvened and, therefore effectively conceded that the appointment, in the ordinary sense of the word, was made during a recess.[18]

Corus challenges the sufficiency of Commissioner Devaney's appointment arguing that the appointment is not valid for the purposes of the recess appointment clause until the President signs a "commission," which did not occur until after the Senate reconvened.[19] Plaintiffs cite *Marbury v. Madison,* 5 U.S. 137, 157 (1803), for the proposition that, until the President's "last act" is complete—i.e. the signature, the appointment is incomplete. While *Marbury* describes the commission as "conclusive evidence" of the appointment, *id.* at 157, it is not clear that the commission is the only sufficient evidence. The court finds that Plaintiffs have not shown that they are highly likely to prevail on this issue.

CONCLUSION

Because Plaintiffs' challenge to the imposition of a tariff underlies its argument as to the status of a Commissioner, the court has jurisdiction pursuant to 28 U.S.C. § 1581(i). The ITC's Motion to Dismiss on jurisdictional grounds is denied. With respect to the ITC's aggregation of votes, the court does not find a clear misconstruction of the governing statute. As in *Maple Leaf Fishing Co.,* it is enough for this case that the ITC made the ultimate injury determination in a manner that does not violate any statutory provision. 762 F.2d at 90. Moreover, the court finds that Congress delegated broad authority to the President and Commission under § 201 and, therefore, the Commission did not act outside its authority in presenting its determination as "equally divided". Defendants' Motion for Summary Judgment is granted as to Count I. As for the preliminary injunction, Plaintiffs' weak showing of imminent irreparable harm and questionable showing of likelihood of success on the merits are insufficient to justify preliminary injunction. Plaintiffs' motion for a preliminary injunction is DENIED.

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[18] This concession may create a factual scenario significantly different than that in *Nippon* 01-00103.

[19] Commissioner Devaney took the oath of office on January 16, 2001. The Commission was signed on January 18, 2001.

(Slip Op. 02–88)

NTN BEARING CORP. OF AMERICA, AMERICAN NTN BEARING MANUFACTURING CORP., NTN CORP., NSK LTD., NSK CORP., KOYO SEIKO CO., LTD., AND KOYO CORP. OF U.S.A., PLAINTIFFS AND DEFENDANT-INTERVENORS *v.* UNITED STATES, DEFENDANT, AND TIMKEN CO., DEFENDANT-INTERVENOR AND PLAINTIFF

Consolidated Court No. 98–01–00146

(Dated August 12, 2002)

ORDER

TSOUCALAS, *Senior Judge:* On the above-captioned matter, the Court received the following: (a) *Draft Results of Redetermination Pursuant to Court Remand ("Draft Results")* in *NTN Bearing Corp. v. United States,* 26 CIT ____, 186 F. Supp. 2d 1257 (2002), and *Final Results of Redetermination Pursuant to Court Remand ("Remand Results")* in *NTN Bearing Corp. v. United States,* 26 CIT ____, 186 F. Supp. 2d 1257 (2002), issued by the United States Department of Commerce, International Trade Administration ("Commerce"); (b) *Comments Regarding the Remand Determination ("Preliminary Comments")* by NTN Bearing Corporation of America, American NTN Bearing Manufacturing Corporation and NTN Corporation ("NTN") dated July 15, 2002, and addressing Commerce's *Draft Results;* and (c) a letter by The Timken Company ("Timken") of July 24, 2002, advising the Court of Timken's intent to file comments in response to those comments that might be filed by NTN in response to Commerce's *Remand Results,* and Timken's response to NTN's comments regarding Commerce's *Remand Results* dated August 5, 2002.[1]

In its *Preliminary Comments,* NTN asserts that Commerce erred in refusing to exclude those sales where the gross unit price plus billing adjustment equaled zero from NTN's dumping margin. NTN maintains that the Court's order that mandated Commerce to exclude NTN's zero-priced sales from NTN's dumping margin should have encompassed NTN's zero-priced sales as well as those NTN's sales where the gross unit price plus billing adjustment equaled zero. Pointing to the fact that NTN's margin was raised, rather than lowered, after Commerce has made Commerce's recalculation, NTN concludes that the abnormality of such effect is a per se indication of Commerce's misinterpretation of the Court's order. Commerce contends that Commerce's actions were in accordance with the Court's order remanding the underlying case, and Timken supports Commerce's position.

[1] Timken's response addresses the arguments raised by NTN in *Preliminary Comments* as if these comments were submitted by NTN in response to Commerce's *Remand Results.* The Court assumes that Timken's actions are caused by NTN's failure to submit NTN's response to Commerce's *Remand Results.* In the fashion analogous to that of Timken, the Court assumes that NTN's failure to submit comments to Commerce's *Remand Results:* (a) constitutes a waiver of NTN's right to submit comments to Commerce's *Remand Results;* and (b) indicates NTN's desire to stand by the arguments raised by NTN in NTN's *Preliminary Comments.*

The Court agrees with Commerce and Timken. Indeed, a zero-priced sale (that is, a transaction made inherently for no consideration) is a form of business dealing that is entirely different in nature from a sale where the gross unit price plus billing adjustment equaled zero (that is, a transaction made for a consideration that was eventually offset by an adjustment given for certain business reasons). Furthermore, the fact that NTN's margin rose as a result of Commerce's recalculation has absolutely no relevance to the issue of interpretation of the Court's mandate, since the change in margin was caused by Commerce's correction of a ministerial error.[2] Therefore, this Court, having received and reviewed the aforesaid documents holds that Commerce duly complied with the Court's remand order, and it is hereby

ORDERED that the *Remand Results* are affirmed in their entirety; and it is further

ORDERED that since all other issues have been decided, this case is dismissed.

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[2] Commerce initially relied on incorrect cost of production data provided by NTN. Commerce corrected this oversight and, consequently, recalculated NTN's margin for Commerce's *Remand Results*. Had NTN been unhappy with Commerce's recalculation, NTN should have asserted its grievances accordingly. The Court, however, fails to fancy a viable legal theory which prohibits an agency from correcting its calculative error as long as the agency applies the correct legal principle.

Index

Customs Bulletin and Decisions
Vol. 36, No. 35, August 28, 2002

U.S. Customs Service

Treasury Decisions

	T.D. No.	Page
Administrative rulings; 19 CFR Part 177; RIN 1515–AC56	02–49	4
Pleasure vessels of Marshall Islands entitled to cruising licenses; 19 CFR Part 4	02–48	1

General Notices

	Page
Wool manufacturer Payment Clarification and Technical Corrections Act	45

CUSTOMS RULINGS LETTERS AND TREATMENT

	Page
Tariff classification:	
Proposed modification:	
Sleep garments	116
Proposed modification and revocation/revocation:	
Cotton headwear	103
Proposed revocation:	
Fortified oat cereal product	98
Spoons	71
Proposed revocation/revocation:	
Motor vehicle plastic seat knob	93
Revocation:	
Snap-off blades	80
Temporary tattoo set	87
Revocation/revocation:	
Bowling ball carrier components of man-made textile fibers imported without bottom panels	66
Current sensors	83
Time-plated containers with handles and hinges not designed to be used primarily as sales packing nor designed as table, kitchen or other household articles of iron or steel	53

U.S. Court of International Trade

Slip Opinions

	Slip Op. No.	Page
Corpus Group PLC *v.* George W. Bush	02–87	157
FAG Italia, S.p.A *v.* United States	02–85	131
Nippon Steel Corp. *v.* United States	02–86	132
NTN Bearing Corp. of America *v.* United States	02–88	169

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